91-1609

Supreme Court, U.S.
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No. 91-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MAGDY F. ANIS - Petitioner

versus

NEW JERSEY COMMITTEE ON ATTORNEY ADVERTISING; DISCIPLINARY REVIEW BOARD OF THE STATE OF NEW JERSEY; HONORABLE JUSTICES OF THE NEW JERSEY SUPREME COURT - - - - - - - - - - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether, consistent with the First and Fourteenth Amendments, a State may prohibit an attorney from sending targeted direct mail advertisements to prospective clients in circumstances where the recipient of the advertisement may not be able to exercise reasonable judgment in employing a lawyer, as a result of a family death caused in an airline accident.

2) Whether, consistent with the Due Process clause of the Fourteenth Amendment, and the rights afforded under *In re Ruffalo*, 390 U.S. 544 (1968), a State can amend an ethics complaint against an attorney to include additional charges against that attorney, which are brought forth as a result of the very evidence put on by the attorney in defense of the original charges.

3) Whether, consistent with the the First and Fourteenth Amendments, a State can prohibit its attorneys from making the claim, in an advertisment, that most other attorneys charge a one-third fee in contingent fee cases when in fact, that claim is true according to statistical data.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Magdy F. Anis, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported as, *In the Matter of Magdy F. Anis, an Attorney at*

Law, 599 A.2d 1265 (N.J. 1992), and is reproduced in the Appendix to this petition at 1a to 25a. The opinion of the New Jersey Disciplinary Review Board, styled, *In the Matter of Fady F. Anis and Magdy F. Anis, Attorneys at Law*, dated January 29, 1991, is unreported and is reproduced in the Appendix to this petition at 26a to 40a. The Opinion of the New Jersey Committee on Advertising, styled, *In the Matter of Fady F. Anis and Magdy F. Anis, Attorneys at Law*, and dated September 26, 1990, is unreported, and is reproduced at 41a to 56a.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on January 10, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Magdy F. Anis (hereinafter "Anis"), is an attorney licensed to practice law in the State of New Jersey. Respondent, the New Jersey Committee on Attorney Advertising (hereinafter "Committee") is given exclusive jurisdiction to consider all grievances against New Jersey attorneys who are alleged to have violated New Jersey Supreme Court *Rules* 7.1 and 7.3 (hereinafter "*N.J.S.C.R.*____"), among other rules, concerning attorney advertising. *N.J.S.C.R.* 1:19A-4(a) et seq. Respondent, the New Jersey Disciplinary Review Board (hereinafter "DRB"), is entrusted with reviewing and rendering a formal decision on all recommendations for public discipline issued by the Committee against an attorney. *N.J.S.C.R.* 1:20-4(f)(1) et seq. Respondents, the Honorable Justices of the Supreme Court of New Jersey have final authority and jurisdiction to impose discipline on all attorneys authorized to practice law in New Jersey. New Jersey Constitution of 1947, Article 6, Section 2, Paragraph 3.

This case arises from a letter sent by Petitioner, on or about January 4, 1989, to a Mr. Peter Lowenstein. The letter invited Lowenstein to consider hiring his firm in pursuing claims with respect to the death of his son, Alexander Lowenstein, in the December 21, 1988 terrorist bombing of Pan American Flight 103 over Lockerbie, Scotland. Mr. Lowenstein filed a complaint with the New Jersey Office of Attorney Ethics, who

referred the matter to the Committee. [1]

The letter in its entirety stated as follows:

January 4, 1989

Mr. Peter Lowenstein
24 Old Orchard Road
Morristown, NJ 07960

Dear Mr. Lowenstein:

Initially, we would like to extend our deepest sympathy for the loss of your son, Mr. Alexander Lowenstein. We know that this must be a very traumatic experience for you, and we hope that you, along with your relatives and friends, can overcome this catastrophe which has not only affected your family but has disturbed the world.

As you may already realize, you may have a legal cause of action against Pan American, among others, for wrongful death due to possible negligent security maintenance. If you intend to take any legal recourse,

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[1]Prior to the sending of this letter, Petitioner requested an opinion from the Committee regarding the sending of targeted direct mail advertisments, albeit as to real estate matters. Petitioner received a response from the Committee advising him that "if you believe your proposed letter falls within the protection afforded by *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466 (1988), you should be guided by your interpretation of said decision". 55a - 56a.

we urge you to consider to retain our firm to prosecute your case.

Both my partner and myself are experienced practitioners in the personal injury field, and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants.

We would also like to inform you that if you do decide to retain our services, you will not be charged for any attorneys fees unless we collect a settlement or verdict award for you.

Before retaining any other attorney, it would be worth your while to contact us, since we will substantially reduce the customary one-third fee that most other attorneys routinely charge.

Please call us to schedule an appointment at your earliest convenience. If you are unable to come to our office, please so advise us and we will have an attorney meet you at a location suitable to your needs.

Very truly yours,
(Mr.) Magdy F. Anis

MFA/seb
P.S. There is no consultation fee.

Upon review of the letter, the Committee filed a formal complaint alleging that Petitioner and his partner [2] violated the

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[2]The case against the partner was dismissed by the Disciplinary Review Board and affirmed by the New Jersey

New Jersey rules of professional conduct, in that:

(1)Petitioner and his partner sent a "written communication to a prospective client for the purpose of obtaining professional employment when they knew or should have known that the physical, emotional or mental state of the recipient was such that he could not exercise reasonable judgment in employing a lawyer", in violation of *N.J.S.C.R.* 7.3(b)(1) [3];

(2)Petitioner and his partner sent a misleading letter, in violation of *N.J.S.C.R.* 7.1(a)(1), in that it stated that Petitioner's firm would "substantially reduce the customary one-third fee that most other attorneys routinely charge;" [4]

Supreme Court.

[3]*N.J.S.C.R.* 7.3(b)(1) (1988) was more liberal than American Bar Association Ethics *Rule* 7.3 (1988), in that the New Jersey Rule permitted direct mail advertising of prospective clients. It is noteworthy that ABA *Rule* 7.3 was amended in February 1989 to permit direct mail advertising in light of the *Shapero* opinion. Unlike the New Jersey Rule though, the amended ABA Rule **did not** prohibit attorneys from sending targeted direct mail advertisements to people whom the attorney "knows or should know", are in an impaired condition, so as to make them unable to make a reasonable decision with regard to hiring counsel. See also American Bar Association House of Delegates, Denver, Colorado, Report Nos. 115 and 120B.

[4]*N.J.S.C.R.* 1:21-7 limits attorneys fees in contingency cases based upon tortuous conduct to 33 1/3% on the first $250,000 recovered; 25% on the next $250,000 recovered; and 20% on

3)Petitioner and his partner failed to make "reasonable efforts to ensure that member lawyers undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional-Conduct, in violation of *N.J.S.C.R.* 5.1(a). [5]

The Committee held a hearing at which Mr. Lowenstein, the Petitioner and his partner testified. Days following the hearing, the prosecuting attorney moved to amend the complaint to include an additional count for misrepresentation of experience, in light of testimony given by Petitioner and his partner at the hearing.

Counsel for Petitioner objected to the motion in a letter [6], 57a-58a, citing the case of *In re Ruffalo*, 390 U.S. 544 (1968). The Committee, nonetheless, granted the motion and allotted the Petitioner an additional hearing to put forth supplementary testimony. Petitioner declined, in light of the irreparable prejudice caused by the questioning at the first hearing.

After review of the evidence, the Committee found that both Petitioner and his partner had violated *N.J.S.C.R.* 7.1(a)(1) (misrepresenting the contingency fee and experience issues) but that neither was guilty of violating *N.J.S.C.R.* 7.3(b)(1), as that

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the next $500,000 recovered.

[5]This count of the complaint was dismissed by the Disciplinary Review Board and affirmed by the New Jersey Supreme Court.

[6] At the hearing, counsel for the petitioner vehemently objected to questions regarding petitioner's experience. See Page 22 of this brief.

Rule was unconstitutional, in light of the then recent case of *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). The Committee recommended a public reprimand for both attorneys.

The DRB reviewed the record and determined that Petitioner had violated *N.J.S.C.R.* 7.1(a)(1), on the same basis which the Committee had decided, and agreed with the Committee that Petitioner did not violate *N.J.S.C.R.* 7.3(b)(1), albeit on different grounds, that being, the solicitation letter was dated two weeks after the accident and that it was debatable whether Petitioner would have known that the Lowenstein family would be unable to exercise reasonable judgment with respect to retaining counsel. The DRB failed to decide on the constitutionality of *N.J.S.C.R.* 7.3(b)(1). The DRB recommended that Petitioner be privately reprimanded and dismissed the matter against Petitioner's partner.

The New Jersey Supreme Court issued an Order to Show Cause why Petitioner should not be otherwise disciplined. Following oral argument, the Lower Court decided that Petitioner's action in sending out the solicitation letter "clearly offends common decency", and is in violation of *N.J.S.C.R.* 7.3(b)(1). *In the Matter of Magdy F. Anis*, at 1267. The Lower Court also found violation of *N.J.S.C.R.* 7.1(a)(1) by Petitioner, regarding the contingency fee and experience issues. The Due Process question regarding the Committee's motion to amend the complaint, which was raised by Petitioner, was adversely decided. Accordingly, Petitioner was publicly reprimanded.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

As to Question 1:

The Federal Question of whether a State may prohibit targeted direct mail advertising in circumstances where the attorney knows or has reason to know that the recipient may not be able to make a reasonable judgment in hiring counsel, was first brought up when the Petitioner filed his answer to the Committee's formal complaint charging Petitioner with violation of *N.J.S.C.R.* 7.3(b)(1).

The Committee decided that, in light of *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), that rule was unconstitutional. The DRB did not decide on the constitutionality of the Rule. The Lower Court decided that *N.J.S.C.R.* 7.3 (b)(1) was constitutional since "the commercial speech guarantees of the First Amendment do not protect conduct that is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families." *In the Matter of Magdy F. Anis*, at 1270. The Court cited no authority for this finding.

As to Question 2:

The Federal Question of whether, consistent with the Due Process clause of the Fourteenth Amendment and the rights afforded under *In re Ruffalo*, a State may amend an ethics complaint against an attorney so as to include additional charges which are brought forth as a result of the very evidence put on by the attorney in defense of the original charges, was

first brought up in Petitioner's counsel's letter in response to the prosecuting attorney's motion to amend the complaint. 57a-58a.

The Committee allowed the amended complaint and found no constitutional violation, but cited no authority. The DRB also found no constitutional violation. The Lower Court agreed that there was no violation and only cited one New Jersey case in support of that finding.

AS TO QUESTION 3:

The Federal Question of whether a State can prohibit its attorneys from claiming, in an advertisment, that most other attorneys charge a one-third fee in contingency cases was first brought up in the Petitioner's answer to the ethics complaint.

The Committee, DRB, and the Lower Court decided that the targeted direct mail advertisement sent by Petitioner, which made such a claim, was misleading in violation of *N.J.S.C.R.* 7.1.

REASONS FOR GRANTING THE WRIT

1) As to Question 1, the decision below conflicts with the decision of Federal Courts of Appeal and with the Decisions of the highest courts of other States.

The decision of the New Jersey Supreme Court is in direct conflict with the decision in *Unnamed Attorney v. Attorney Grievance Commission*, 545 A.2d 685 (Md. 1988). In considering precisely the same challenge to an identical Rule, the highest court of Maryland rejected the validity of *Rule*

7.3(b)(1) of the Rules of Professional Conduct which prohibits an attorney from forwarding targeted mail to a person whose state of health would impair the recipient's ability to make a reasonable judgment as to hiring an attorney. Instead that Court reasoned that:

> "[i]n light of Shapero, we note the doubtful constitutional validity of Subsection (b)(1) of Rule 7.3. . . In that opinion the Supreme Court counseled that in determining whether a given solicitation is constitutionally protected, "[t]he relevant inquiry is not whether there exists potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."
>
> ....
>
> "We interpret Shapero to mean that written modes of solicitation (as opposed to in-person solicitation) are protected by the First Amendment, regardless of the recipient's condition. . . . We believe that Rule 7.3(b)(1), which improperly focuses solely on the condition of the recipient of the solicitation, has questionable validity."

Id. at 691.

Likewise, the United States District Court for the Eastern District of Pennsylvania, in striking down a law on direct mail solicitation, concluded that the problems addressed in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 477 (1978) with in-person solicitations were not present with "direct mailings to targeted segments of the population and specifically named individuals with legal needs in these areas". *Spencer v. Honorable Justices*

of Supreme Court of Pennsylvania, 579 F.Supp. 880, 882 (E.D. Pa. 1984), *aff'd sub nom, Spencer v. Supreme Court of Pennsylvania*, 760 F.2d 261 (3d Cir. 1985).

That Court went on to say that:

> "[I]t is true that some members of the general public may be offended or disturbed upon receiving unsolicited mail from lawyers . . .however, the Supreme Court held that the fact that protected commercial speech may be offensive to some does not provide a sufficient justification for its suppression. Bolger v. Youngs Drug Products Corp., ____ U.S. ____, 103 S.Ct. 2875, 2883, 77 L.Ed. 469, 480 (1983). Whereas the target of in-person solicitation is a captive audience and cannot escape objectionable or offensive speech, the recipients of direct mail can avoid any affront of their sensitivities by simply throwing the letters in the trash can.

Id. at 890 quoting, *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

The highest Court of New York has taken a like position. In, *In Matter of Von Wiegen*, 470 N.E.2d 838 (N.Y. 1984), that Court reversed lower court rulings banning targeted direct mail advertising to personal injury clients. In that case, attorney Von Wiegen sent targeted direct mail letters to victims and families of 250 persons injured when the sky-walk collapsed at the Hyatt Regency Hotel in Kansas City, Missouri. The Court stated that mail solicitation of accident victims or their families "does not constitute a substantial invasion of privacy or present a risk of undue pressure. The simple answer to the claim that it does is that the recipient of a lawyer's letter may escape exposure to objectionable material simply by transferring it from envelope to wastebasket." *Id.* at 844. The

Court reasoned that "it is not enough to justify a ban upon solicitation that in some situations, such as marital discord or **a death in the family**, the letter might be offensive. . . the same observation applies to accident victims and their families." *Id.* at 844 (emphasis added).

Although both Courts in *Von Wiegen* and in *Spencer* failed to directly address the constitutionality of 7.3 (b)(1), the reasoning in those cases leaves the constitutionality of that Rule in a very questionable state, if not, implicitly declaring it unconstitutional.

In contrast, the New Jersey Supreme Court in *In the Matter of Magdy F. Anis*, upheld the constitutionality of *N.J.S.C.R.* 7.3(b)(1), and stated that "[W]e have no doubt, then, that the commercial speech guarantees of the First Amendment do not protect attorney conduct that is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims o[r] their families". *In the Matter of Magdy F. Anis*, 599 A.2d 1265, 1270 (N.J. 1992). The Lower Court noted that "[T]he non-intrusive nature of the communication in *Shapero* is what commended the solicitation to commercial speech protection . . . In contrast, the form of solicitation at issue here is so universally condemned that its intrusiveness can hardly be disputed." *In the Matter of Magdy F. Anis*, at 1269.

In reaching this decision, however, the Lower Court failed to account for this Court's direct observation that:

> "[p]rint advertising like petitioner's letter--and targeted, direct mail solicitation generally--"poses much less risk of overreaching or undue influence" than does in-person solicitation, Zauderer, 471 U.S., at 642. Neither mode of written communication involves "the coercive force

> of the personal presence of a trained advocate" or the pressure on the potential client for an immediate yes-or-no answer to the offer of representation." Ibid. Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement . . . can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,'" Ohralik, supra, at 465, n. 25 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)). A letter like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." Zauderer, supra, at 642. **Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large.** The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery."

Shapero, at 475 (emphasis added).

The Court in *Shapero* stressed that:

> "[a] particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity for good judgment" regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement--concededly constitutionally protected activities--or instead mails a targeted letter. **The relevant inquiry is not whether there exist potential clients whose "condition" makes**

> **them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.**

Shapero, at 474 (emphasis added).

Although the Lower Court opinion, at first glance, may seem to hinge solely upon the receipient's condition, after careful reading, it appears that the Lower Court equally bases its decision on the "decency" or "indecency" of the particular advertisement; which itself, is an unconstitutional criterion to utilize in regulating attorney advertising. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 670 (1985). In fact, the concurring justice was very distressed with just that point, when he says: "[m]y remaining concern is that the Court's opinion may be misconstrued as an invitation to turn decency or callousness into a critical factor in disciplinary matters involving attorney advertising." *In the Matter of Anis*, at 1272, (Justice Handler concurring).

The Lower Court, in requiring target direct mail advertisement to be "decent" before it would be constitutionally protected, is in direct conflict with the highest court of New York in its decision in *Matter of Von Wiegen*, *supra*, and more importantly, is in discord with this Court's opinion in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In that case, this Court stated that:

> "[a]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights . . . [t]he mere possibility that

> some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

Zauderer at 670.

Finally, it is essential to note that a decency standard is so vague that it cannot pass constitutional muster. A statute is void for vagueness when it fails to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . ." *Papachristo v. City of Jacksonville*, 405 U.S. 156 (1972); *Graynard v. City of Rockford*, 408 U.S. 104 (1972). Such a decency standard is too fluid a concept that it cannot guide or notify an attorney as to actions which are proper and those which are not. Even the Lower Court, at the end of its opinion, strugles with the length of time that attorneys must wait before sending out a targeted mail advertisement. An arbitrary waiting period of, at least, two weeks and a day, was set in order to guide attorneys, pending hearings by the Committee. [7]

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[7] Petitioner sent his letter out precisley 14 days following the plane crash; had he waited until the 15th day, theoretically, based upon the Lower Court decision, he would not have been disciplined. It is noteworthy that Petitioner never had the advantage of the Lower Court's "over two week" rule, since that rule's existence only came about as a result of the Petitioner's actions. As such, the Lower Court rule is likened to an ex-post-facto law, in violation of the Fourteenth Amendment.

2) As to Questions 1 through 3, the decision below involves important questions of Federal Law which have nationwide implications and should be settled by this Court.

A. Implications of Question 1

The nationwide importance of the targeted direct mail advertising issue is illustrated by the multiplicity of litigation in which this issue has arisen. In addition to the State and Federal cases referred to in Section 1, supra, there are at least two reported State Court cases and one Federal Court case which have addressed the issue of accident victim direct mail advertising.[8]

Moreover, the New Jersey Rule (1988), although unlike the American Bar Association Rule (1988), is very similar, if not identical, to rules passed by a large number of the States. This is due to the fact that the Rule in question had been recommended by the Commission on Evaluation of Professional Standards (the "Kutak" Commission) in 1983. Even today, notwithstanding the ABA's amendment to *Rule* 7.3 in February

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[8]*The Florida Bar: Petition to Amend Rules*,571 SO.2d 451 (Fla. 1990); *Koffler v. Joint Bar Ass'n*, 412 N.E. 2d 927 (N.Y. 1980), *cert denied sub nom, Joint Bar Ass'n Grievance Committee, Tenth Judicial District v. Koffler*, 450 U.S. 1026 (1981); *National Funeral Services Inc. v. Rockefeller*, 870 F. 2d 136 (4th Cir. 1989).

1989 [9], in light of the *Shapero* decision, many States still continue to maintain that Rule.

Even in view of the apparent clarity of this Court's holdings, the decisions of state bar associations ethics committees on the targeted direct mail of accident victims issue has been surprisingly diverse.[10]

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[9] The amended ABA *Rule* 7.3, in pertinent part, states as follows: "A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if: (1) The prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coersion, duress or harassment. ABA Model *Rule* 7.3(b). No mention is made of the condition of the recipient in the amended rule.

[10]Mississippi Ethics Opinion 158 (12/2/88) (Attorneys are no longer bound by *Rule* 7.3 as it relates to direct solicitation by mail); Nebraska Ethics Opinion 88-4 (undated) (Attorneys must abide by *Rule* 7.3(b)(1) when soliciting by way of direct mail advertising); Philadelphia (Pa.) Ethics Opinion 88-25 (9/7/88) (Attorneys may send direct mail ads to potential customers of local cemeteries as long as recently bereaved families are avoided); Ohio Ethics Opinion 88-5 (4/21/88) (Attorneys may send a card in the mail to recently injured automobile accident victims); Oregon Ethics Opinion 520 (8/88) (Attorneys may advertise in letters to accident victims as long as information is truthful); Pennsylvania Ethics Opinion 87-43 (9/87) (Attorneys may send direct mail letters to accident victims); Rhode Island Ethics Opinion 88-29 (1/12/89) (*Rule* 7.3(b)(1) prohibits attorneys from sending targeted direct mail letters to recent accident victims).

In view of the importance of targeted direct mail advertising to all attorneys, the national scope of ABA Model *Rule* 7.3, the apparent confusion among state bar associations about this Court's precedents, the extent of the litigation on the targeted direct mail issue and the conflict between the New Jersey Supreme Court's decision and other State and Federal Court decisions, the granting of certiorari to review the judgment below is justified.

B. Implications of Question 2

In finding no procedural due process violation with the Committee's action in granting the presenter's motion to amend the complaint in mid-stream, the New Jersey Supreme Court disregarded this Court's decision in *Matter of Ruffalo*, 390 U.S. 477 (1978).

In the *Ruffalo* decision, this Court was faced with a situation in which an attorney was charged with twelve counts of improper ethical behavior. At the hearing which followed, Ruffalo and a witness testified as to certain specific issues which tended to exculpate Ruffalo from one of the charges. Immediately after hearing the testimony, the Board added a thirteenth charge based on the exculpatory testimony which Ruffalo and the witness had proffered. Ruffalo was later found to have violated that thirteenth count, and was disbarred.

In disagreeing with the Lower Court, this Court reasoned that:

"These are adversary proceedings of a quasi-criminal

> nature. CP In re Gault, 387 U.S. 1, 33. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start a fresh."

Id. at 122.

In the instant case, Petitioner was alleged to have violated three ethics Rules, one of which was misleading Mr. Lowenstein by stating in the letter that the customary fee that other attorneys charge is one-third. At the hearing, Petitioner made a number of arguments to bolster his position that the letter was not misleading. One of these arguments was that the Warsaw Convention limited recovery in airline accidents to $75,000, and therefore, the normal fee charged by other attorney's would be one-third. [11] Upon hearing this argument, the Committee questioned Petitioner as to his experience and as to the number of cases he had tried. Petitioner's counsel objected. Testimony went as follows:

> MR. CHAIRMAN: And you felt that the maximum recovery in this case was $75,000?
>
> MR. WITNESS: Yes, sir, I did.
>
> MR. CHAIRMAN: And do you know the date when the determination was made that there was -- the plane

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[11]This is so because, $75,000 would fall within the first segment of the fee scale, allowing attorney's to charge one-third. See Footnote 4.

was sabotaged, totally destroyed?

THE WITNESS: I do not.

MR. CHAIRMAN: Was it before or after January 4th?

THE WITNESS: Again, I'm not sure.

MR. CHAIRMAN: So, you weren't then thinking of the saboteur or the bomb as a possible defendant as of the date you authored the letter?

THE WITNESS: Well, there was talk of the fact that it was sabotage, at some point in time, probably previously to this, because they were making a lot of guess -- there was a lot of guess work with respect to how it blew up, or what happened.

MR. CHAIRMAN: All right.

MR. WITNESS: And, I'm sorry.

MR. CHAIRMAN: Go ahead, finish.

THE WITNESS: And, you know, they had no idea what happened and I probably would have listed the captain as well as a possible defendant, although that's vicarious liability and we would have, you know, basically been looking at Pan Am anyway. But, I felt that I had to, in order to try to be at least a little complete with respect to that, to advise there are other possible defendants.

MR. CHAIRMAN: All right. Now, you were admitted approximately two years at the time of this letter.

THE WITNESS: Or so, yes.

MR. CHAIRMAN: And, you say you were an experienced practitioner in the personal injury field. Was that a fact?

THE WITNESS: With respect to personal injury, I had a lot of cases, yes.

MR. CHAIRMAN: Can you quantify that for us? In two years, how many?

MR. SCHOTTLAND: I object to this. That's not within the charge that there's a misrepresentation on that aspect and I'm not sure that I'm prepared, in going over this case with my client, to go through this. If the Committee was going to amend the complaint to allege that there's some other misrepresentation, I want to have a look at the complaint first and then have an opportunity to prepare a defense.

MR CHAIRMAN: Okay. That objection is overruled. Can you quantify your personal injury experience?

THE WITNESS: I believe approximately thirty cases.

MR. CHAIRMAN: Any airline cases?

THE WITNESS: No. I don't think I've made that presentation. But, I did have a lot of experience with airline cases when I was getting my (phonetic) degree.

MR. CHAIRMAN: By experience, you mean you read about them?

> THE WITNESS: We read about them, we did mock trials. Because this was basically the field I was getting into, and I did a lot of work with respect to that. That's why the first thing that entered into my mind with this, was the limit, the Montreal Protocol to the Warsaw Convention, which sets the limit.
>
> MR. CHAIRMAN: How long had you -- you referred to your partner as being an experienced practitioner. How long had he been admitted then?
>
> THE WITNESS: I believe five years.
>
> MR. CHAIRMAN: And had he had experience in personal injury cases?

A few days after the hearing, the prosecuting attorney moved to amend the complaint to include charges of misrepresentation as to Petitioner's experience. Notwithstanding objection by counsel for the Petitioner at the hearing and by way of a letter, 57a-58a, the Committee granted the motion.

The similarities between the case at hand and that of *Ruffalo*, are remarkable. Also remarkable is the fact that the New Jersey Supreme Court disregarded the *Ruffalo* decision in its entirety.

In the case at bar, the motion to amend the complaint to include an additional count for misrepresentation of experience came as a direct result of the Petitioner's argument about the Warsaw Convention, which argument was made in defense of one of the original charges. Surprisingly, the Lower Court outwordly stresses that point, when it says that "[H]is [Anis']

argument that the Warsaw Convention invariably limits damages to $75,000.00 only illustrates his inexperience in this type of potentially complex litigation." *In the Matter of Magdy F. Anis*, at 1272. In *Ruffalo*, this Court held that adding charges to the complaint as a result of exculpatory testimony, as was the case with Petitioner, is unconstitutional, since "the charge must be known before the proceedings commence". *Ruffalo* at 122. This requirement was established so as to give the attorney "fair notice as to the reach of the grievance procedure and the precise nature of the charges..". *Id.* at 123.

In the instant case, Petitioner was never aware of the experience issue until mid-way into the hearing when the questioning commenced as to his experience, over objection of counsel. There was no prior notice of this charge, and Petitioner was not prepped by his attorney as to this issue.

Although the Committee attempted to cure the due process violation by allotting the Petitioner an opportunity for a supplemental hearing, this could not, and did not, mend the violation. *Ruffalo* at 122, FN 4. This Court was faced with precisely the same situation in *Ruffalo*, and pointed out that:

> "[t]his argument overlooks the fact that serious prejudice may well have occured because of the original 12 specifications of misconduct. He may well have been lulled into a false sense of security that he could rebut charges No. 4 and 5 by proof that Orlando [the witness] was his investigator rather that a solicitor of clients. In that posture he had no reason even to suspect that in doing so he would be, by his own testimony, irrevocably assuring his disbarment under charges not yet made."

Id. at 122, FN 4.

By rebutting one count of misrepresentation, Petitioner was charged with another count. This Court, in *Ruffalo*, admonished this type of action, and the similarities between the instant case and *Ruffalo* requires a similar result.

This due process question merits review by this Court, in light of the fundamental rights involved and the nationwide implications on all attorneys in the United States who may face ethics charges.

C. IMPLICATIONS OF QUESTION 3

This case involves a multi-district situation in which lawyers from many states, especially the adjoining State of New York, could possibly have solicited the families of the victims who perished in Pan American Flight 103. In that light, Petitioner wrote in his targeted direct mail advertisement that:

> "...we will substantially reduce the customary one-third fee that most other attorneys routinely charge".

Although New Jersey does not permit a straight one-third contingency fee [12], Petitioner made the statement, nonetheless, since he was in direct competition with out-of-state attorneys who are permitted to charge a straight one-third fee. Further, knowing full well that the most common percentage rate used in contingency fee contracts is in the neighborhood of one-third of the recovery [13], Petitioner asserted that the letter, as it was,

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[12]See Footnote No. 4 as to the sliding scale fee.

[13]See J. Kakalik & N. Pace, Costs and Compensation Paid In Tort Litigation 37 (1986).

was not misleading. [14]

The Lower Court disagreed and found the statement to be misleading, in violation of *N.J.S.C.R.* 7.1(a)(1) (1988), which states as follows:

> "A lawyer shall not make false or misleading communications about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> > (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

The Lower Court reasoned that the letter "incorrectly implied that a normal attorney's fee would be one-third, despite the 'graduated fee' provisions of Rule 1:21-7". *In the Matter of Magdy F. Anis*, at 1272. The Court totally disregarded Petitioner's argument that he was in competition with out-of-state lawyers who are permitted to charge a straight one-third fee, and therefore, the letter was not misleading. Rather, the Court only reiterated Petitioner's other argument regarding the recovery limitations set forth by the Warsaw Convention; which argument was rejected.

In *Peel v. Attorney Reg. & Disciplinary Com'n*, 110 S.Ct. 2281 (1990), this Court stated:

> "Whether the inherent character of a statement places it beyond the protection of the First Amendment is a

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[14] It is noteworthy that three members of the DRB voted to dismiss all charges against Petitioner.

> question of law over which Members of this Court should exercise *de nove* review. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 495-511 (1984). That the Judgment below is by a State Supreme Court exercising review over the actions of its State Bar Commission does not insulate it from our review for constitutional infirmity.

Id. at 2292, citing, *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

In the case at hand, Petitioner made the statement with the view that this is a multi-district case which could be handled by out-of-state counsel. In that light, and keeping in mind that most ordinary citizens percieve a one-third fee in contingency cases[15], Petitioner was confident that the letter was not misleading. Moreover, since the Lower Court cannot prohibit out-of-state attorneys from making a claim similar to the one in question, to New Jersey citizens [16], since those attorneys are outside of the Lower Court's jurisdiction, it may be argued that such a restriction on New Jersey attorneys is a violation of the equal protection clause of the Fourteeth Amendment.

Review of this question by this Court is justified since it affects a fundamental right, and since it surely will resurface many times over in national proportions.

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[15]See Footnote 12.

[16] Theoretically, such a claim would not be considered misleading by out-of-state counsel whose State employs a straight one-third contingency fee rate.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of New Jersey.

Respectfully submitted,

BY:_____
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DATED: APRIL 7, 1992

APPENDIX

NEW JERSEY SUPREME COURT OPINION IN THE MATTER OF MAGDY F. ANIS

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

IN THE MATTER OF MAGDY F. ANIS, AN ATTORNEY AT LAW (D-28)

Argued Sept. 10, 1991 -- Decided January 10, 1992

PER CURIAM

This case arises from the December 21, 1988 terrorist bombing of Pan American Flight 103 over Lockerbie, Scotland. One of the victims of that disaster was Alexander Lowenstein, a resident of Morristown, N.J. The day after Alexander's remains were identified, Magdy Anis and his brother, Fady F. Anis, sent a solicitation letter to Peter Lowenstein, Alexander's father. The letter invited Mr. Lowenstein to consider retaining the Anis law firm to sue the airline for negligent security. The letter also contained information regarding the experience of the Anis firm in personal injury lawsuits as well as information regarding legal fees.

On January 12, 1989, Peter Lowenstein filed a complaint with the Office of Attorney Ethics (OAE). The OAE referred the matter to the Committee on Attorney Advertising (Committee). A formal complaint alleged that Magdy Anis and

Fady Anis had improperly engaged in a written communication with a prospective client when they knew or should have known that the person's physical, emotional, or mental state was such that the client could not exercise reasonable judgment in employing a lawyer in violation of RPC 7.3(b)(1). The two attorneys were also charged with engaging in false and misleading advertising in violation of RPC 7. 1(a) (1).

The Committee found that clear and convincing evidence demonstrated that the attorneys had engaged in false and misleading advertising. The Committee reasoned that the letter did not state the amount of the fee and failed to indicate any range of fees for the services to be provided. Moreover, the letter misrepresented the professional backgrounds of both brothers for the purpose of retaining employment in potentially sophisticated litigation. Nonetheless, the Committee determined that without the misleading statement, the letter of solicitation was constitutionally protected. The Committee recommended that both attorneys be publicly reprimanded.

In its review process, the Disciplinary Review Board (DRB) determined that clear and convincing evidence supported the Committee's conclusion that Magdy Anis had engaged in unethical conduct. It did not agree with the imposition of discipline on Fady Anis. The DRB also concluded that because the letter was dated two weeks after the Lockerbie crash, it was debatable whether Anis would have known that the families would be unable to exercise reasonable judgment with respect to retaining counsel; therefore, there was no violation of RPC 7.3(b)(1). The DRB recommended that Magdy Anis be privately reprimanded.

SYLLABUS (D-28)

HELD: Under the circumstances of this case, the appropriate discipline for Magdy F. Anis is a public reprimand.

1. The standard in determining whether an attorney knows or should have known that a family would be unable to make a reasoned judgment about retaining counsel is an objective one. An ordinarily prudent attorney would recognize that within the hours and days following a tragic disaster, families would be particularly weak and vulnerable. (pp. 8-12)

2. Anis's contention that the limitations placed on attorney advertising by RPC 7.3(b)(1) are unconstitutionally overbroad is without merit. (pp. 12-13)

3. In imposing discipline here, the Court addresses only conduct that is patently offensive to the common sensibilities of the community because it intrudes on the private grief of victims or their families, serves only to compound their sorrow, and solicits representation of them at a time when they are extremely vulnerable. There is clear and convincing evidence that Magdy Anis solicited legal representation at a time when he knew or should have known that the prospective clients could not exercise reasonable judgment in employing an attorney. (pp. 13-14)

4. The Court attempts no permanent bright-line rule. The matter is remanded to the Committee to conduct an informational hearing in order to best inform the Court how it might draw a clearer line of vulnerability. Pending this hearing process, and in order to give New Jersey attorneys reasonable and interim guidance, absent some case-specific indications to the lawyer that the family could not exercise reasonable

judgment in this matter, the court shall not impose discipline for truthful letters of solicitation sent more than two weeks after such a disaster occurs and loss becomes known. (pp. 14-15)

5. Magdy Anis engaged in misleading advertising; his letter incorrectly implied that a normal attorney's fee would be one-third and falsely implied that he was experienced in litigating aircraft accidents. (p. 16)

So Ordered.

JUSTICE HANDLER, concurring, is of the view that decency is not to be the central consideration, and may serve as a confusing and ambiguous criterion for evaluating ethical conduct with respect to commercial speech; it is because such conduct hurts people and destroys their privacy that it should be restrained. Any guidelines considered by the Committee should identify and define the circumstances under which professional solicitation will unduly infringe on personal privacy or will increase personal suffering.

CHEF JUSTICE WILENTZ and JUSTICES CLIFFORD, POLLOCK, O'HERN, GARIBALDI and STEIN join in this opinion. JUSTICE HANDLER has filed a separate concurring opinion.

SUPREME COURT OF NEW JERSEY
D-28 September Term 1991

IN THE MATTER OF --
MAGDY F. ANIS,
An Attorney at Law.

Argued September 10, 1991 -- Decided January 10, 1992 On an order to show cause why respondent should not be disbarred or otherwise disciplined.

Patrick J. Monahan, Jr. argued the cause on behalf of Committee on Attorney Advertising.

Michael D. Schottland argued the cause for respondent (Schottland, Vernon, Aaron & Costanzo, attorneys).

PER CURIAM

The familiar spectacle of lawyers and their agents preying on the victims of disaster has occasioned revulsion and prompted calls for reform. In the aftermath of the tragic release of poison gas at the Union Carbide plant in Bhopal, India, "American lawyers rushed to India in an attempt to retain clients and in their zeal brought shame and discredit to the American Bar." Eric S. Roth, Confronting Solicitation of Mass Disaster Victims, 2 Geo. J. Legal Ethics 967, 972 (1989) (Roth). The examples of abuse are chilling. Shortly after the crash of a Northwest airliner in Detroit on August 16, 1987, a man posing as a Catholic priest appeared on the scene to console the families of the victims. He "hugged crying mothers and talked with grieving fathers of God's rewards in the hereafter. He even sobbed along with dazed families * * *. Then he would pass out the business card of a Florida attorney

* * * and repeatedly urge them to call the lawyer.", Roth, supra, 2 Geo. J. Legal Ethics at 972 n. 19 (quoting Matt Beer, 'Priest' at Crash Site Recommends Lawyer, Nat'l L.J., Oct. 5, 1987, at 3). After the crash of Pan Am Flight 103 in Scotland, one victim's widow reported solicitation "by no less than 30 attorneys within 24 hours of the crash." Ibid. (citing Andrew Blum, Lawyers Start Mapping Pan Am Crash Tactics, Nat'l L.J., Jan. 9, 1989, at 3, 20).

Other examples abound. "How much money would you like to get out of this case?" a letter asked the mother of a child who had recently suffered brain damage in an automobile accident. It was one of three letters she had received from attorneys within two weeks of her son's accident. In the same envelope was a police report with the lawyer's card stapled to it. In the view of an Oregon Bar Association commentator, "[s]uch a letter clearly offends common decency." Richard Sanders, Lawyer Advertising and Solicitation: the Good, the Bad, the Unethical, 50 Or. St. B. Bull. 5 (June 1990); see generally Linda S. Althoff, Solicitation after an Air Disaster: The Status of Professional Rules and Constitutional Limits, 54 J. Air. L. & Com. 501 (1988) (Althoff) (discussing ethical and constitutional dimensions of solicitation).

The question in this case is whether the commercial speech guarantees of the First Amendment confer on lawyers the right to engage in such conduct -- conduct that clearly offends common decency. We think not and therefore disapprove the ruling of our Committee on Attorney Advertising, which held that such a solicitation letter cannot constitute unethical conduct because it is a protected form of commercial speech. We conclude that a public reprimand is the appropriate measure of discipline under the circumstances of this case.

I

This case arises from the tragic disaster on December 21, 1988, involving Pan American Flight 103 over Lockerbie, Scotland. On that homeward-bound holiday flight, American passengers, many of them college students, were the victims of international terrorism. One of the victims was Alexander Lowenstein, a student at Syracuse University and resident of Morristown, New Jersey. His remains were identified on January 3, 1989. The following day, respondent and his brother, Fady F. Anis, sent the following solicitation letter to Peter Lowenstein, Alexander's father:

> Dear Mr. Lowenstein:
>
> Initially, we would like to extend our deepest sympathy for the loss of your son, Mr. Alexander Lowenstein. We know that this must be a very traumatic experience for you, and we hope that you, along with your relatives and friends, can overcome this catastrophe which has not only affected your family but has disturbed the world.
>
> As you may already realize, you have a legal cause of action against Pan American, among others, for wrongful death due to possible negligent security maintenance. If you intend to take any legal recourse, we urge you to consider to retain our firm to prosecute your case.
>
> Both my partner [Fady] and myself are experienced practitioners in the personal injury field, and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants.

We would also like to inform you that if you do decide to retain our services, you will not be charged for any attorneys fees unless we collect a settlement or verdict award for you.

Before retaining any other attorney, it would be worth your while to contact us, since we will substantially reduce the customary one-third fee that most other attorneys routinely charge.

Please call us to schedule an appointment at your earliest convenience. If you are unable to come to our office, please so advise us and we will have an attorney meet you at a location suitable to your needs.

Very truly yours,

(Mr.) Magdy F. Anis

MFA/seb
P.S. There is no consultation fee.

The hollow sentiments of the letter's opening line could only have deepened the family's suffering. On January 12, 1989, Peter Lowenstein filed a complaint with the Office of Attorney Ethics (OAE). The OAE referred the letter to the Committee on Attorney Advertising (Committee). A formal complaint alleged that respondent and his brother had improperly engaged in a written communication with a prospective client when they knew or should have known that the person's physical, emotional, or mental state was such that the prospective client could not exercise reasonable judgment in employing a lawyer. That conduct violates RPC 7.3 (b) (1). An amended complaint charged the two attorneys with engaging in false and misleading advertising by sending a letter

that was misleading and contained material misrepresentations in violation of RPC 7.1 (a) (1). Respondent and his brother have raised a due-process challenge to the amended charge, seeking dismissal on the grounds of "unfairness." We have considered their procedural arguments and have concluded that under In re Logan, 70 N.J. 222, 231 (1976), they have been afforded "sufficient opportunity to meet the charge."

The attorneys also asserted that their conduct was constitutionally protected, citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 100 L. Ed. 2d 475 (1988), and referring to an unanswered inquiry that they had sent to the Committee. Consideration of the full record convinced the Committee that clear and convincing evidence demonstrated that the attorneys had engaged in false and misleading advertising in violation of RPC 7.1(a)(1). The Committee reasoned that although the letter stated that respondent and his brother Fady would substantially reduce the customary one-third fee, it did not state the amount of the fee and failed to indicate any range of fees for the legal services to be rendered. Indeed, it suggested that other attorneys would charge a one-third fee on a recovery, despite the rule that in the event of a recovery in excess of $250,000 no attorney may charge that amount absent a court order. See R. 1:21-7. The Committee also found that the letter misrepresented the professional backgrounds of both brothers for the purpose of retaining employment in potentially sophisticated litigation, a violation of RPC 7.1(a)(1). Respondent had been admitted to the bar in 1987 and his brother, Fady, in 1984. Neither brother was a certified civil or criminal trial attorney, and neither of them had ever tried a case to a judge or jury or handled a personal injury matter involving the negligence of an airline. The Committee concluded that

> [t]here is absolutely no basis in the record to suggest to the public that they were experienced practitioners in the

> personal-injury field in general and, implicitly, international aircraft litigation in particular. Their perception of themselves, if such was the case, was clearly erroneous. Their representation as to their experience constituted a false and misleading communication.

The Committee determined that without the misleading statement, the targeted direct-mail solicitation, notwithstanding the shocking circumstances in which it arose, was constitutionally protected. It reasoned that Shapero, supra, 486 U.S. 466, 100 L. Ed. 2d 475, which had disapproved blanket bans on all targeted mail solicitation, required that result.

The Committee recommended that both attorneys be publicly reprimanded. The Disciplinary Review Board (DRB), which pursuant to our Rules of Procedure reviews such disciplinary recommendations, determined that clear and convincing evidence fully supported the Committee's conclusion that respondent, Magdy F. Anis, had engaged in unethical conduct. It did not agree, however, that the facts merited discipline in the case of his brother, Fady F. Anis. Fady had been out of the State when Magdy had mailed the letter and had not participated in its mailing. The DRB also dismissed a related charge against both Fady and Magdy of violating RPC 5.1(a) (failure to make reasonable efforts to ensure that all members of a law firm conform to the Rules of Professional Conduct). Because the solicitation letter was dated two weeks after the Lockerbie crash, the DRB concluded that it was debatable whether the attorneys would have known that the families would be unable to exercise reasonable judgment with respect to retaining counsel. Accordingly, it found no violation of RPC 7.3 (b) (1), albeit not on the constitutional basis of protected speech that the Committee had found. The DRB recommended a private reprimand for Magdy Anis. The Court

issued an order to show cause why he should not be otherwise disciplined.

I I

The time has long since passed when we can view the practice of law as a matter of public trust in which a barrister's fee was but a gratuity for the performance of a public service. Barristers wore their purses at their backs to allow the payment of fees "without any face-to-face exchange or acknowledgment of the commercial transactions." Althoff, supra, 54 J. Air L. & Com. at 519 n. 117. The time has not yet come, however, when we must view the practice of law as akin to the sale of aluminum siding. It is not that we think any the less of those engaged in such a calling; we expect the truth of them too. See N.J.A.C. 13:45A-16. 1 to -16.2. It is simply that we expect much more from attorneys. We have adopted a model of professionalism commensurate with the duties of our calling:

> [T]hrough all the [years] * * * the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers.
>
> [In re Vincenti, 92 N.J. 591, 603 (1983) (quoting Schware v. Board of Examiners, 353 U.S. 232, 247, 1 L. Ed.2d 796, 806 (1957) (Frankfurter, J., concurring)).]

From a profession charged with such responsibilities, there must always be exacted "a high sense of honor." Ibid.

That standard surely translates into conduct that does not fall below the meager level of common decency that should attend the usual affairs of humankind.

Respondent's conduct falls within a window left open in Shapero, supra, 486 U.S. 466, 100 L. Ed. 2d 475. In a long series of cases the Supreme Court has etched out a pattern for decision in such matters. We reviewed most of the early cases in In re Felmeister & Isaacs, 104 N.J. 515, 537 (1986), our seminal decision on attorney advertising.

The Supreme Court has devised a standardized legal test for commercial-speech cases. Such speech is entitled to constitutional protection only if it concerns lawful activities and is not misleading. Government may regulate even protected speech with laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose. Peel v. Attorney Disciplinary Comm., 495 U.S.___, 110 L. Ed. 2d 83, 94 (1990). A blanket ban on a targeted direct-mail solicitation of parties facing a foreclosure suit could be regarded as a violation of commercial speech rights, Shapero, supra, 486 U.5. 466, 100 L. Ed. 2d 475, but such a solicitation presents none of the factors that concern us here.

The non-intrusive nature of the communication in Shapero is what commended the solicitation to commercial speech protection. See Shapero, supra, 486 U.S. at 575-78, 100 L. Ed. 2d 485-87. In contrast, the form of solicitation at issue here is so universally condemned that its intrusiveness can hardly be disputed. An editorial cartoon in a Miami newspaper portrayed lawyers after the Delta 911 air crash disaster as "vultures, members of the law firm of Pickem, Pickem, Scavage & Bone... Don't Call Us -- We'll Call You!" Howard R. Messing, The Latest Word on Solicitation, Fla. Bar J., May 1986, at 17 n.3 (quoting The Miami Herald, Aug. 16, 1985, at

2OA). Those are not the reactions of competitors, nor of establishment lawyers, nor even of airline-industry officials. Those are the reactions of the very public that lawyers serve.

We have always emphasized that one of the central goals of attorney discipline is to maintain public confidence in the bar and in the professionalism of its members. We have not enacted a blanket ban on targeted direct-mail solicitation. We believe, however, that the proscription of RPC 7.3(b)(1) against such direct solicitation of clients who are vulnerable and probably not able to make a reasoned judgment on their behalf surely embraces the hours and days after such a tragic disaster occurs or, as here, after the loss becomes known. Members of the plaintiffs' bar candidly admit that people are particularly vulnerable at such times. They criticize the controversial "Alpert letter" that survivors often receive from airlines on the basis that "the letter takes advantage of families when they are emotionally weak and vulnerable and attempts to get them to settle for less money than they might recover after filing a law suit." Roth, supra, 2 Geo. J. Legal Ethics at 976-77. (The "Alpert letter" is an inverse form of solicitation used by an airline's insurer that is designed to dissuade survivors and the families of victims of mass disaster from filing lawsuits or hiring an attorney on a contingent-fee basis.) Id. at 975-76.

The DRB reasoned that respondent could not be held to have violated RPC 7.3(b)(1) because no proof existed that the respondent actually knew that the Lowenstein family would be unable to make a reasoned judgment about retaining counsel. We disagree. The standard that we attach to this Rule of Professional Conduct is an objective one. We believe that an ordinarily prudent attorney would recognize that within the hours and days following a tragic disaster, families would be particularly weak and vulnerable. Indeed, experience confirms such objective expectations. A mother, faced with attorney

solicitation shortly after her daughter's death in a car crash, reacted: "give me some time -- I am still grieving." Allessandra Stanley, Bronx Crash, Then Contest of Lawyers, N.Y. Times, June 17, 1991, at B1. That some recipients might not be offended by such a letter does not rebut the generality of experience that the intrusive nature of such solicitation compounds the suffering of victims or their families. Similarly, an objective standard relieves lawyers of the burden of ascertaining whether prospective clients might be unduly sensitive. Whatever doubts may exist about the outer limits embraced by RPC 7.3(b)(1), any reasonable lawyer would conclude that an obsequious letter of solicitation delivered the day after a death notice would reach people when they "could not exercise reasonable judgment in employing a lawyer * * *" RPC 7.3(b)(1). Although respondent proffered that he delayed mailing his letter so that "it wouldn't be tasteless," he admitted that he did not know at the time that he mailed the letter whether Alexander's body had yet been identified.

Respondent's contention that the limitations placed on attorney advertising by RPC 7.3(b)(1) are unconstitutionally overbroad is without merit. The United States Supreme Court has stated that the overbreadth doctrine does not normally apply to commercial speech. See Board of Trustees v. Fox, 492 U.S. 469, 481, 106 L. Ed. 2d 388, 404 (1989).

We have no doubt, then, that the commercial speech guarantees of the First Amendment do not protect attorney conduct that is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims of their families. Even in the limited context of the bland, targeted direct-mail solicitation of mortgagors in a foreclosure proceeding, the dissenting members in Shapero emphasized the substantial public interest concomitant with the special role of attorneys.

486 U.S. at 488-91, 100 L. Ed. 2d at 494-96 (O'Connor, J., dissenting). In her dissenting opinion, Justice O'Connor pointed out the reason that we regulate lawyers at all, indeed, to a greater extent than most other professions are regulated:

> Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished * * under modern conditions, without a trained and specialized body of [attorneys]. This training is one element of what we mean when we refer to the law as a "learned profession." * * * One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market * * *.
>
> Imbuing the legal profession with the necessary [legal and] ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. * * * Restrictions on advertising and solicitation by lawyers * * * act as a concrete day-to-day reminder to thepracticing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other.
>
> [Id. at 488-90, 100 L. Ed. 2d at 494-96.]

We have recognized the attorneys' right to distribute truthful, non-deceptive advertising of their services. See RPC 7.1. Indeed, lawyer advertising may provide alternative avenues of relief to members of the public who are unaware of the legal options available to them. Even in cases of mass disaster,

general public notices in affected regions might serve that end without the offensive intrusiveness of a targeted solicitation. See Althoff, supra, 54 J. Air L. & Com. at 520-21 n. 119.

Nothing in the Constitution, however, requires us to countenance solicitation that intrudes upon victims or their families in the initial throes of their grief. In imposing discipline for such conduct, we wish to make it clear that we do not seek to convert into constitutional doctrine some sort of an effete etiquette for lawyers nor even a disguised version of the previously-disapproved standard of dignity for attorney advertising. See In re Felmeister & Isaacs, supra, 104 N.J. at 547. What we are talking about here, as is our concurring member, is conduct that is patently offensive to the common sensibilities of the community because it intrudes upon the private grief of victims or their families, serves only to compound their sorrow, and solicits representation of them at a moment of their extreme vulnerability.

On the basis of our independent review of the record, see R. 1:20-5(a), we find clear and convincing evidence that respondent solicited legal representation at a time when he knew or should have known that the prospective clients could not exercise reasonable judgment in employing an attorney, in violation of RPC 7.3(b)(1). We realize that there may be other cases in which it will be more difficult to draw the line of ethical propriety. Would a truthful solicitation letter sent fifteen or thirty days after a tragic loss reach people when they are no longer emotionally weak or vulnerable? We cannot say with certainty, since our assumptions in such cases are largely untested. It may be that there are degrees of loss or suffering. Common sense tells us that the mildly-injured survivors of an overturned-bus incident might be less vulnerable than were the Lockerbie families. Hence, we attempt no permanent bright-line rule in this opinion. We hereby refer the issue to our

Committee on Attorney Advertising to conduct the type of informational hearing that might best inform us how we might draw a clearer line of vulnerability. In such a hearing process, the Committee might invite comments from the public or public organizations concerned with the delivery of legal services.

We are mindful that whatever lines we draw may economically disadvantage New Jersey lawyers in relation to unscrupulous lawyers from unregulated jurisdictions. We cannot, however, establish our attorney discipline at the lowest common denominator of ethics. Even those attorneys from other jurisdictions must abide by our Rules of Professional Conduct when they perform services in New Jersey. See R. 1:20-1(a). Pending the suggested hearing process, and in order to give New Jersey attorneys reasonable interim guidance, absent some case specific indications to the lawyer that the family could not exercise reasonable judgment in the matter, we shall not impose discipline for truthful letters of solicitation sent more than two weeks after such a disaster occurs and loss becomes known.

III

Based on our independent review of the record, we also find clear and convincing evidence that the respondent engaged in misleading advertising in the two respects cited. His letter incorrectly implied that a normal attorney's fee would be one - third, despite the "graduated fee" provisions of Rule 1:21-7. His argument that the Warsaw Convention invariably limits damages to $75, 000 only illustrates his inexperience in this type of potentially complex litigation. When damage is caused by an airline's "willful misconduct," it may be subject to unlimited compensatory liability. See In re Air Disaster at Lockerbie, Scotland, 928 F.2d 1267, 1285-86 (2nd Cir. 1991);

In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475, 1488-89 (D.C. Cir. 1991) ("It is settled that willful misconduct negates the due care exclusion from liability contained in Article 20 and the monetary limitations contained in Article 22."). In addition, others might have been made parties defendant. His letter also falsely implied that he was experienced in litigating aircraft accidents. Nothing could be further from the truth. Even were we to credit fully his proffer of proof about the general negligence practice of his firm, there is simply no correlation between such an office practice and the degree of expertise in aircraft accident trials that his letter implied.

We recognize respondent's youth and inexperience, but we cannot agree that the private reprimand recommended by the DRB will sufficiently measure the discipline to be imposed. The entire record of the proceedings below is before us in this review. Rule 1:20-5(a) requires the Court to review all presentments to the DRB that recommend public discipline. The Committee on Attorney Advertising had recommended that the DRB impose a public reprimand. We conclude that the written solicitation of understandably vulnerable clients and the false and misleading nature of the letter warrant a public reprimand.

Respondent is to reimburse the Ethics Financial Committee for appropriate administrative costs.

Chief Justice Wilenz and Justices Clifford, Pollock, O'Hern, Garibaldi, and Stein join in this opinion. Justice Handler has filed a separate concurring opinion.

SUPREME COURT OF NEW JERSEY
D-28 November Term 1991

IN THE MATTER OF
MAGDY F. ANIS,
An Attorney at Law.

HANDLER, J., concurring.

Shortly after a large commercial airplane crashed at Lockerbie, Scotland, killing everyone on board, respondent Magdy F. Anis, and his brother, Fady F. Anis, sent a letter to Peter Lowenstein, whose son perished in the tragedy. The letter, which Mr. Lowenstein received on the day following the confirmation of his son's death, invited Mr. Lowenstein to consider employing the Anis law firm to secure legal redress for his son's death. Respondent's letter also contained false and misleading statements relating to the lawyers' qualifications for such professional services.

I concur in the Court's determination that respondent engaged in misleading advertising that warrants professional discipline. I also share the Court's dismay at respondent's insensitivity in mailing such a letter to the parent of an accident victim. Although such conduct richly deserves the strongest kind of disapproval and criticism imaginable, my remaining concern is that the Court's opinion may be misconstrued as an invitation to turn indecency or callousness into a critical factor in disciplinary matters involving attorney advertising.

This concern relates to the Court's interpretation of the focus of the ethical prohibition contained in Rules of Professional Conduct 7.3 (b)(1) (hereinafter "RPC"), which provides in pertinent part:

> (b) A lawyer shall not contact, or send a written communication to a prospective client for the purpose of obtaining professional employment if:
>
> * * *
>
> (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer....

The Comment to RPC 7.3 states that the purpose of this rule is to prevent social harms such as harassment and overreaching, and that the circumstances under which the contact is initiated should be considered in determining whether such a violation occurs. Its focus is exclusively on the state of mind of the attorney sending the communication and indirectly on the presumed emotional or mental condition of the person receiving the communication. Other ethics rules govern the acceptability of other aspects of communications involving proposals of "professional employment," including false or misleading statements. See RPC 7.1 and 7.2.

The Court, in characterizing respondent's letter, states that "the commercial speech guarantees of the First Amendment do not protect attorney conduct that is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims of their families. " Ante at (slip op. at 12). That interpretation properly indicates that RPC 7.3(b)(1) is concerned with important privacy interests of persons who may be considered potential clients. The Court's emphasis on individual privacy interests, however, is also coupled with the notion of

"common decency." The Court reverses the determination of the Committee on Advertising, namely, that "a solicitation letter [that offends common decency] cannot constitute unethical conduct because it is a protected form of commercial speech." Ante at (slip op. at 3). According to the Court, the central issue in this case is whether the First Amendment prohibits an attorney's "commercial speech" that "offends common decency." Ibid.

I do not read the Court's holding to suggest that "common decency" constitutes a determinative factor in assessing attorney conduct implicating commercial speech. Rather, I interpret the Court's opinion to be that RPC 7.3(b)(1) focuses on the need to protect a class of persons, potential clients, from certain harmful forms of professional behavior. The prohibitions contained in the rule are designed to prevent attorneys from transforming personal tragedies into business opportunities generated at the public's expense. It may be that the conduct involved in sending mailings to members of the public who are distraught and vulnerable because of tragedies in their lives is "beneath common decency." That conduct should be prohibited because it is hurtful and invasive, not because it is indecent or contemptible.

We should not suggest that the gravamen of the misconduct under the rule is its lack of decency. A rule that could be interpreted to bar indecent or offensive advertising lacks the clarity of purpose necessary to preserve the protections that are afforded to commercial speech. Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed.2d 810 (1977). The basic standards for determining whether an attorney's exercise of commercial speech violates the ethics rules governing advertising have been expressed by the United States Supreme Court in several cases: Peel v . Attorney Disciplinary Comm., 495 U.S. ___, 110 L.Ed.2d 83 (1990); Zauderer v.

Office of Disciplinary Counsel, 471 U.S. 626, 85 L.Ed.2d 652 (1985); Central Hudson Gas & Flee. v. Public Service Comm., 447 U.S. 557, 65 L.Ed. 2d 341 (1980). The commercial speech of attorneys may be restricted only to advance a substantial governmental interest and only through means that directly advance that interest. Peel, 495 U.S. at,___, 110 L.Ed.2d at 94.

Although the State has a substantial interest in preventing attorney advertising that is false and misleading, it has no cognizable interest in preventing attorneys from engaging in advertising that only offends societal mores. Thus, in Zauderer, the Supreme Court expressed doubt that the state's desire that their attorneys maintain "dignity" is "an interest substantial enough to justify the abridgement of their First Amendment rights." 471 U.S. at 648, 85 L.Ed. 2d at 670. In In re Felmeister & Isaacs, 104 N.J. 515 (1986), we faced a challenge to RPC 7.2(a), which required all attorney advertisements "to be presented in a dignified manner." There we rejected the "dignity" standard, noting both the Supreme Court's reluctance to apply the standard in Zauderer and the general difficulties involved with the application of such a standard. Id. at 547. The Court concluded that the same interests could be protected by requiring all attorney advertisements to be "predominantly informational. "

Setting aside my disagreement with the implementation of that requirement, I agreed with the Court in Felmeister that the dignity, tastefulness or style of an advertisement should not be considered relevant as a regulatory standard. Felmeister, supra, at 564-65 (Handler, J., concurring in part and dissenting in part). The only concerns that are relevant to restrictions on attorney advertising focused on the false or misleading nature of the communications or other substantial state interest:

A court should not have to fret about whether an

> advertisement appeals more to the heart than the mind. Instead, it should concentrate on whether an attorney's advertisement may effectively serve the public by alerting some consumers to a previously unsuspected need for legal help... [I]t is unlikely that attorneys will be able to engage with impunity in ... offensive advertising ... [a]s observed in Trantolo, supra, 470 A.2d at 234, "[I]f some members of the audience find *** [the advertisements] distasteful, such consumers might very well react by shunning the service offered, thereby implying an informed sanction more effective than any formal regulation.
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> [Id. at 565.]

The United States Supreme Court in Shapero v. Kentucky Bar Association, 486 U.S. 466, 100 L.Ed. 475 (1988), dealt with attorney commercial advertising in the form of direct mail solicitations. The Court fully recognized the heightened vulnerability of potential clients in certain settings. It opined that attorney mailings, even though targeted to persons with special needs, are far less overreaching than in-person solicitation because the latter entails the kind of immediate response and badgering not applicable to the former. Id. at 475, 100 L.Ed. 2d at 486.

The Court in Shapero, however, did not immunize attorney advertising in the form of direct mailings from the reasonable restrictions that are allowed under the First Amendment. Although the Court expressed concern about well-intended, but overbroad, restrictions on free speech, it concluded that a blanket prohibition could not be placed on mailings to clients known to have particular legal needs. In that case, a member of the Kentucky Bar had applied to the State

Attorneys Advertising Commission for approval of a letter that he wanted to send to "potential clients" against whom a foreclosure suit had been filed. The letter stated that "[f]ederal law may allow you to. .. ORDE[R] your creditor to STOP," and that "you may call my office for FREE information," and that "[i]t may surprise you what I may be able to do for you." The Court's primary inquiry in Shapero was whether the mailings, which specifically targeted those known to need legal services and who were therefore overly susceptible to coercive pressures by lawyers, would allow lawyers to exploit that susceptibility. 486 U.S. at 474, 100 L.Ed. 2d at 484-85. Thus, although the Court acknowledged that direct-mail solicitations were far less intrusive or offensive than in-person solicitations, they themselves presented opportunities to exploit client susceptibilities. However, the existence of such opportunities does not justify a total ban. Ibid. The instruction of Shapero is that the First Amendment limits a state's ability to dictate the form and content by which an attorney solicits legal business, and that regulatory interference with attorney advertising may not be permitted absent a showing that a substantial state interest would be served by such regulation.

The Court recognizes that there is an important distinction between Shapero and the instant case that lies in the intrusiveness of the communication. It states that the lawyer's conduct in the present case was so universally condemned that "its intrusiveness can hardly be disputed." Ante at ____ (slip op. at 9-10). The content of the letter, considered in the context in which it was sent, renders it invasive and hurtful. Its offensive quality inheres in the harmfulness of the attorney's conduct, exploiting the vulnerability and exacerbating the suffering of a potential client. The indecency and incivility of sending such a letter to someone who has, as in this case, just experienced a tragedy, surely offends our sensibilities.

However, "[d]ecency", as such, is not the central consideration, and, indeed, may serve as a confusing and ambiguous criterion for evaluating ethical conduct with respect to commercial speech; it is because such conduct hurts people and destroys their privacy that it should be restrained.

The Court's explanation of the standards that must govern our advertising restrictions should therefore focus on the harmful and invasive aspects of such commercial speech, and not on any articulation of restrictions in terms of "decency." The Court's concerns are best served by analyzing attorney advertising in terms of protecting overwrought and vulnerable persons from attorneys who attempt to solicit employment, as well as the State's obligation to protect the right to privacy of citizens facing a tragedy in their lives. These concerns, I believe, undergird government's substantial interest in assuring the welfare of its citizens, an interest that can well be accommodated by the First Amendment.

Therefore, I agree with the Court that we should refer this matter to our Committee on Attorney Advertising to consider guidelines explaining the conditions governing written advertisements directed by attorneys to vulnerable members of the public. Such a rule should identify and define the circumstances under which professional solicitations will unduly infringe on personal privacy or will increase personal suffering.

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90 - 284 & DRB
90-285

IN THE MATTERS OF
MAGDY F. ANIS AND
FADY F. ANIS,
ATTORNEYS AT LAW

Decision and Recommendation of the
Disciplinary Review Board

Argued: November 28, 1990

Decided: January 29, 1991

Patrick J. Monahan, Jr. appeared on behalf of the Committee on Attorney Advertising.

Michael D. Schottland appeared on behalf of respondents.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter is before the Board based on a recommendation for public discipline filed by the Committee on Attorney Advertising. That recommendation concerns a targeted direct-mail solicitation letter forwarded to families of New Jersey victims of the crash of Pan American Flight No. 103 in Locherbie, Scotland; on December 21, 1988.

Respondent Fady Anis was admitted to the practice of law in December 1984. His brother and partner, respondent Magdy Anis, was admitted to the practice of law in December 1987. They are engaged in the practice of law as the firm of Anis & Anis, with offices in Jersey City and Hazlet, New Jersey.

Pan American Flight No. 103 crashed in Locherbie, Scotland, on December 21, 1988. There were no survivors. Among the victims was Alexander Lowenstein, a resident of Morristown, New Jersey and a student at Syracuse University. On January 3, 1989, his parents received verification of his death in the airplane crash. Two days later, on January 5, 1989, his body was returned to New Jersey. He was buried on January 7, 1989. A solicitation letter, dated January 4, 1989, was sent by Magdy Anis to Alexander Lowenstein's father, Peter Lowenstein. Among the statements made within that six-paragraph letter were the following:

> Both my partner and myself are experienced practitioners in the personal injury field, and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants.
>
> **Before retaining any other attorney, it would be worth your while to contact us, since we will substantially reduce the customary one-third fee that most other attorneys routinely charge (original emphasis).**

Some time after receipt of this letter Peter Lowenstein contacted the Office of Attorney Ethics and questioned the ethical propriety of the letter from Magdy Anis. Mr. Lowenstein's letter was thereafter referred to the Committee on Attorney Advertising. Respondents were charged in a Three

Count Formal Complaint filed with the Committee on Attorney Advertising. Count One of that Complaint charged that respondents' conduct in sending the letter to Mr. Lowenstein at that particular time violated RPC 7.3(b)(1) because "they knew, or should have known that the physical, emotional or mental state of the recipient was such that he could not exercise reasonable judgment in employing a lawyer." In the Second Count of the Complaint, respondents were charged with violation of RPC 7.1(a)(1), by "making a false or misleading statement about themselves or the services they render, by asserting the material misrepresentation of fact or law, or omitting the fact necessary to make the statement considered as a whole not materially misleading". This charge was directed specifically to respondents' claim that they would substantially reduce the "customary one-third fee that most other attorneys routinely charge." In Count Three of the Formal Complaint, respondents were charged with failing to ensure that all lawyers within the firm conform to the Rules of Professional Conduct, in violation of RPC 5.1(a).

Following the November 28, 1990 formal hearing in this matter before a hearing panel of the Committee on Attorney Advertising, the committee granted a motion to amend the complaint to charge respondents with further violation of RPC 7.1(a)(1), by misrepresenting their experience in the personal injury field. That motion was granted by the committee over the continuing objection of respondents' counsel.

The underlying facts of this case are not in dispute. Magdy Anis admits both the authorship and the mailing of the January 4, 1990 solicitation letter to Peter Lowenstein. The Lowenstein letter was one of eleven mailed to the families of New Jersey victims of the Locherbie crash. Fady Anis admitted that he had discussed the concept of a targeted direct mailing in this matter with his brother. However, he had traveled to

Florida on January 2, 1989, and did not participate in the actual drafting or mailing of the letter to the victims' families.

Of the eleven letters forwarded to the families of New Jersey victims of the Locherbie crash, all names and addresses were obtained through the media, according to Magdy Anis. None of those targeted responded to the solicitation letter. In his testimony, Magdy Anis noted that he considered that he was in competition with other New Jersey firms and possibly New York firms in this matter. New York Courts permit a fee of 33 1/3 percent on the total recovery and personal injury actions. Moreover, the Montreal Protocol to the Warsaw Convention limits recovery to survivors of air crashes to $75,000. He stated that, under the Convention, it was "virtually impossible" to recover a greater amount. It was, therefore, his opinion that the Lowenstein estate would not receive more than $250,000, which would result in a maximum one-third fee to the attorney under either New Jersey or New York Court Rules. He stated that he determined to cut the firm's fee as a result, to a maximum of twenty-five percent on the first $250,000. Nonetheless, he did not specify the intended fee within the solicitation letter "because I didn't want them to basically take this around and use it as a bidding game. You know, this attorney gave me this, what will you give me, what will you give me." 1T59.[1]

With regard to the issue of experience, Magdy Anis testified that, since his admission to the Bar in 1987, he had handled approximately thirty personal injury cases, none of which involved airlines. Between ten and twelve of those cases were settled prior to the filing of the complaint. He had also

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[1]1T denotes the transcript of hearing before the Committee on Attorney Advertising on June 22, 1989,

taken cases in international claims in preparation for his LLM. As of the time the letter in question was mailed, he had never tried a case before a judge or a jury, nor had he taken any continuing legal education course. Neither he nor his brother are certified civil or criminal trial attorneys. None of the cases handled by Magdy or Fady Anis involved airlines.

Fady Anis had handled approximately twenty cases since his admission to the Bar in 1984. Again, none of his cases was tried either before a judge or a jury. As noted previously, Fady Anis advised that he was aware that his brother intended to send targeted mail to the families of the victims. He did not discuss the matter further with his brother until several days after his return from Florida. He did not see the letters before they were mailed by his brother. He testified that, although he had agreed with his brother that the letter should be sent, he would have preferred to see them before they were mailed. Additionally, he termed the letter a "little unartful". He further stated that the paragraph within the letter that referred to the intended fees to be charged was accurate, although "(i)t may not have been worded in the best way possible.... " 1T124.

Respondents contended that their actions were constitutionally protected, under the case of Shapero us. Kentucky Bar Association, 486 U.S. 466 (1988). Respondent Magdy Anis noted at hearing that he had contacted the Committee on Attorney Advertising regarding an intended targeted direct mail solicitation letter to two prospective real estate clients. At that time, he was advised that the New Jersey rule had not yet been amended to conform to Shapero, and that the Committee on Attorney Advertising was, therefore not considering requests that might involve Shapero issues'. Magdy Anis was directed to be "guided by (his) interpretation of said decision."

Following hearing, the committee determined that respondents' written communication to a prospective client to obtain professional employment had violated RPC 7.3(b). However, based on its analysis of Shapero, the committee found no unethical conduct. In the committee's view, respondents were within their first amendment rights, as delineated in Shapero, when the targeted direct mail solicitation letter was mailed to Mr. Lowenstein. Count One of the Complaint, which alleged violation of RPC 7. 3 (b) (1), was therefore dismissed.

The committee further found that both respondents had engaged in false and misleading advertising, contrary to RPC 7.1 (a) (1), because the letter forwarded by respondent Magdy Anis to Mr. Lowenstein contained false and misleading advertising. Specifically, the language concerning reduction of the fee was

> designed to make the retention of respondents financially attractive, but it did not state what the fee would be and failed to indicate any range of fees of the legal services to be rendered. Nor did it set forth a reasonable disclosure of all relevant variables and considerations so that this blanket statement would not be misunderstood or be deceptive. Indeed, it suggests that other attorneys would charge a one-third fee on a recovery, even though, in the event of a recovery in excess of $250,000, that amount could not be charged absent specific court order.

The committee determined also that respondents' non-disclosure of their intended reduced fee of twenty-five percent to the potential client was to avoid "shopping around" by the client among other attorneys for a lower fee. The

committee found that the intentional emphasis of this statement, typed in boldface, had the "real potential to beguile unsophisticated members of the public to employ respondents with the implicit promise of some unstated fee advantage."

The committee expressed greater concern with respondents' claims of expertise in the personal injury arena. The committee found that respondents' statement that "both my partner and myself are experienced practitioners in the personal injury field, and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants" was a "brazen and deceptive" boast. This was done, according to the committee, "with the intention of procuring employment in a potentially sophisticated litigation." The Committee found significant the fact that neither Fady nor Magdy Anis had ever tried a single case before a judge or jury, or handled a personal injury matter involving an airline. Nor was either attorney licensed as a certified civil or criminal triad attorney. The committee found absolutely no basis in the record to suggest that respondents were, indeed, experienced practitioners in the personal injury arena or, implicitly, in the international aircraft litigation in particular.

The committee also found a violation of RPC 5.1(a). It noted that neither Fady Anis nor Magdy Anis had made any effort to ensure that, as members of the firm, they were in compliance with the disciplinary rules, when the offending letter was authored and mailed. The committee noted the fundamental difference between the retaining of legal counsel versus the purchase and use of consumer products, given the possible impact on the consumer's rights as well as the possible serious long-term consequences. The committee determined that some form of discipline was necessary. It concluded that, although no damage had been suffered by any client as a result of respondents' false and misleading communication,

misrepresentations of experience or ability are among the most serious and potentially damaging communications an attorney can make. At best, they can result in an uninformed choice of counsel. At worst, they may ultimately affect the clients' basic rights and have serious long-term consequences." The committee, therefore, recommended that respondents Magdy and Fady Anis each be publicly reprimanded.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusions of the Committee on Attorney Advertising in finding respondent Magdy Anis guilty of unethical conduct are fully supported by clear and convincing evidence. The Board does not, however, concur with the quantum of discipline recommended. Nor does the Board agree that discipline is merited in the case of respondent Fady Anis. At hearing before the Board, the presenter argued that, contrary to the committee's finding, respondents had violated RPC 7.3(b). The presenter contented that, although the Supreme Court had amended RPC 7.3 following Shapero, RPC 7.3 (b) (1) had not been altered. Thus, respondents' violation of RPC 7.3 (b) (1) was not constitutionally protected. The Board has fully considered the arguments of counsel on this issue. The rule in question states that a lawyer "... shall not contract, or send a written communication to, a prospective ..client for the purpose of obtaining professional employment if: (l)the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer....". RPC 7.3(b)(1). Here, the solicitation letter was dated two weeks after the Locherbie crash. While any lawyer "reasonably should know" that the families of the victims continued to be distressed by their joss, it is, at best, debatable whether the families would also be unable to "exercise reasonable judgment in employing a lawyer." The letter in question may have been tasteless, particularly given that its arrival at the Lowenstein home unfortunately coincided so closely in time to the verification of Alexarider Lowenstein's death and the funeral that followed. There is not, however, any proof that respondents were aware or should have been aware of any inability on the part of the victims' families to exercise reasonable judgment. Absent such proof, the Board cannot find, to a clear and

convincing standard, that RPC 7.3(b)(1) has been violated. Given this finding, it is unnecessary to reach the question of the constitutionality of this section.[2] The Board, therefore, concurs with the dismissal of the Court by the Committee on Attorney Advertising, albeit on different grounds. As previously noted, the complaint in this matter was amended following a hearing to expand the charge of violation of RPC 7.1(a)(1) to include a misrepresentation of respondents experience in the solicitation letter. The committee granted the motion to amend, over respondents' objection. That objection was raised again before the Board. The remedy sought by respondents was not a further opportunity to be heard. Rather, respondents sought dismissal of that aspect of the complaint on grounds of "unfairness." A proffer was made to the Board by respondents' counsel that he would have gone into more detail with his clients on their training and experience, and might have hired an expert witness concerning procedure in aircrash cases. In rebuttal, the presenter noted that respondents were not "sandbagged" by raising the issue of experience at the conclusion of the hearing: the information was obtained during cross examination as a natural progression from questioning of Magdy Anis on his experiences with contingent fee situations. The Board has considered this issue and concludes that it was properly amended to include charges of misrepresentation of experience, contrary to RPC 7.1 (a) (1). Respondents were already on notice that the contents of the solicitation letter allegedly violated RPC 7.1(a)(1), although the paragraph concerning experience was not specifically implicated. They have been on notice of the inclusion of the charge of misrepresentation of experience since the complaint was amended, following the July 1989 motion. Respondents declined the offered opportunity for further hearing at that time (See Presenter's brief to the

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[2]In any event, and pursuant to R. 1:20-4(F)(3), constitutional challenges to ethics proceedings are to be "preserved; without Board action, for Supreme Court consideration".

Committee on Attorney Advertising, dated November 28, 1989). At hearing before the Board, in response to questioning, counsel for respondents specifically stated that a remand was not being sought. Respondents have, therefore, been afforded "sufficient opportunity to meet the charge." In re Logan, 70 N.J. 222, 231 (1976). While it is clear that the charge was made after the initial hearing was concluded, the offer of further hearing, refused by respondents, cured any prejudice that this might have possibly created (although respondents have not demonstrated prejudice in any substantive manner here. In re Logan, supra, 70 N.J. at 232). As in Logan, "the amendment did not modify the factual episode and respondent[s] [were] afforded a full opportunity to meet the amended charge." As did the Court in Logan, this Board finds respondents' reliance on In the Matter of Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 2d 117, reh. den. 391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed. 2d 874, mod. on other grounds, 392 U.S. 919, 88 S.Ct. 2257, 20 L.Ed. 2d 1380 (1968), to be inappropriate.

The Board agrees with the committee that improper misrepresentations were made in the solicitation letters in two areas. First, the statement in the highlighted portion of the letter concerning the promise of a substantial reduction in "the customary one-third fee that most other attorneys routinely charge" violated RPC 7.1(a)(4), because it both failed to represent accurately the sliding scale of the contingent fees charged under R. 1:21-7, and failed to state clearly the percentage fee that would be charged. Without these elements, i.e., accurate statement of contingent fees generally and a specific statement of the exact percentage to be charged, the description was both deceptive and easily misunderstood. RPC 7.1 (a)(4)(ii). Respondents' claim that the amount of the settlement and, hence, the amount of the contingent fee were limited by the Montreal Protocol to the Warsaw Convention,

does not cure this violation. As pointed out by the presenter, the Protocol applies to the airline's liability and does not address that of other possible defendants.

Even more troubling is the misrepresentation, contained in the solicitation letter, of respondents' experience. The statement in the letter read that respondents were both "experienced practitioners in the personal injury field." In fact, contrary to this statement, neither respondent had ever tried a case before a judge or a jury, had been certified as a civil or criminal trial attorney or had taken any continuing legal education courses. Moreover, neither respondent had ever had any involvement in a personal injury case involving an airline. At the time Magdy Anis drafted the letter extolling his and his partner's experience, he had been admitted to the practice of law for just one year. During much of that year, he was involved in studying for an LLM.

Giving respondent Magdy Anis' qualifications a most generous view, his experience in personal injury matters in January 1990 was marginal at best. He was certainly not an experienced practitioner in the personal injury field. His claim of experience in the solicitation letter was a blatant misrepresentation, which violated RPC 7.1(a)(1). As author and sole signatory on that letter, he must be held personally responsible.

While the Board agrees with the committee that respondent Magdy Anis violated RPC 7.1(a)(1), it does not agree that RPC 5.1(a) comes into play here. The record shows that respondent Magdy Anis alone is guilty of unethical conduct here. Although a partner in the firm of Anis & Anis, it would be somewhat convoluted to expect respondent Magdy Anis, as the firm's representative, to supervise himself to insure that he, himself, complied with the Rules of Professional

Conduct. The Board, therefore, finds no violation of RPC 5.1(a) by respondent Magdy Anis.

The facts, as found by the committee, demonstrate that Fady Anis discussed the concept of a targeted direct-mailing solicitation letter to the families of New Jersey victims of the Locherbie crash. He was not, however, involved in the actual drafting of the letter, and he did not review or approve the letter prior to mailing. Although the letter was drafted on the firm's letterhead, it was signed only by Magdy Anis. In fact, the letter was mailed without Fady Anis' knowledge or authorization. The Board does not agree with the committee that his failure to disavow the letter upon his return from Florida, several days after the letter was sent, is sufficient basis for discipline. Once the letter containing the misrepresentation was mailed by Magdy Anis, the unethical conduct had occurred. Fady Anis did not, himself, misrepresent his experience, or the fee intended to be charged. His partner/brother did. The Board, therefore, cannot find clear and convincing evidence of violation of RPC 7.1(a)(1) by Fady Anis. Moreover, the Board is not convinced that Fady Anis' failure to retract this letter is a violation of RPC 5.1 (a), which requires that every law firm "make reasonable efforts" to ensure that all firm lawyers conform to the Rules of Professional Conduct. The Board, therefore, finds no evidence of unethical conduct on the part of Fady Anis, and recommends that the Committee on Attorney Advertising's recommendation for discipline be dismissed as to Fady Anis.

As to Magdy Anis, however, some form of discipline is required. Discipline is imposed not to punish the offender, but to protect the public against the attorney who cannot or will not measure up to the high standards of responsibility required of every member of the profession. In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 15 N.J. 321, 325 (1978).

The Court has recently addressed a similar advertising case. In Matter of Caola, 117 N.J. 108 (1989), the attorney was publicly reprimanded for sending a solicitation letter to a prospective client, grossly misrepresenting his background and experience as a criminal defense attorney. Caola stated in that letter that his "firm" (he was a sole practitioner) had represented the local police and fire department in their defense of various criminal matters, and had "defended indictments in all the major drug cases in the last nine years". Id at 109. In fact, Caola had been admitted to practice just over seven years. During that time, he had represented individuals in only three drug cases, and had never represented either the police department or the fire department. Caola was publicly reprimanded for his numerous misrepresentations.

The level of misconduct in the case at hand is less egregious than that found in Caola. Moreover, in mitigation, respondent Magdy Anis had been admitted just over a year when this misconduct occurred. A requisite majority of the Board, therefore, recommends that Magdy Anis be privately reprimanded. Three members of the Board voted for a dismissal. In the view of one of these three members, an objective, rather than subjective, standard must be applied to determine whether the statements in the letter were misleading. That member was not convinced that an objective standard had been met.

As to Fady Anis, the Board unanimously recommends dismissal of the charges against him.

The Board further recommends that respondent Magdy

Anis be required to reimburse the Ethics Financial Committee for appropriate administrative costs.

Date:

By:
Raymond R. Trombadore
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
COMMITTEE ON ATTORNEY ADVERTISING
CAA INDEX NUMBER 1-89

IN THE MATTER OF:

MAGDY F. ANIS	COMMITTEE REPORT
FADY F. ANIS	RECOMMENDING
ATTORNEYS AT LAW	PUBLIC DISCIPLINE

To the Honorable Chair and members of the Disciplinary Review Board:

PROCEDURAL HISTORY

Magdy F. Anis and Fady F. Anis, hereinafter Respondents, are attorneys-at-law of the State of New Jersey and, at all times relevant hereto, maintained offices located at 2974 Kennedy Boulevard, Jersey City, New Jersey and 82 Bethany Road, Hazlet, New Jersey.

On February 23, 1989, a formal Complaint (Exhibit P-5) was filed with the Committee on Attorney Advertising and served upon Respondents.

On March 16, 1989, Respondents filed their formal Answer (Exhibit P-6) with the Committee.

On June 22, 1989, a formal hearing was held before a Hearing Panel consisting of Francis X. Crahay, Esq., Chair; Richard L. Bland, Jr., Esq. and Mr. George M. Dragonetti. Patrick J. Monahan, Jr., Esq., appeared as Presenter and Michael D. Schottland, Esq., appeared on behalf of Respondents.

On September 29, 1989, an Amended Complaint was filed with the Committee on Attorney Advertising and served upon Respondents. A formal Answer to the Amended Complaint was not required and consequently none was filed.

FINDINGS OF FACT

On December 21, 1988, Pan American Flight #103 crashed in Locherbie, Scotland, with extensive loss of life. One of the victims was Alexander Lowenstein, a student at Syracuse University and resident of Morristown, New Jersey. Mr. Lowenstein's death was verified to his parents on January 3, 1989. His body was returned to the United States on January 5, 1989 and buried on January 7, 1989. By letter dated January 4, 1989, Respondents sent the following solicitation to Mr. Peter Lowenstein, the father of Alexander Lowenstein:

> Dear Mr. Lowenstein:
>
> Initially, we would like to extend our deepest sympathy for the loss of your son, Mr. Alexander Lowenstein. We know that this must be a very traumatic experience for you, and we hope that you, along with your relatives and friends, can overcome this catastrophe which has not only affected your family but has disturbed the world.
>
> As you may already realize, you have a legal cause of action against Pan American, among others, for wrongful death due to possible negligent security maintenance. If you intend to take any legal recourse, we urge you to consider to retain our firm to prosecute your case. Both my partner and myself are experienced practitioners in the personal injury field,

and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants.

We would also like to inform you that if you do decide to retain our services, you will not be charged for any attorneys fees unless we collect a settlement or verdict award for you. (Underlining in original).

Before retaining any other attorney, it would be worth your while to contact us, since we will substantially reduce the customary one-third fee that most other attorneys routinely charge. (Boldface in original).

Please call us to schedule an appointment at your earliest convenience. If you are unable to come to our office, please so advise us and we will have an attorney meet you at a location suitable to your needs.

Very truly yours,

(Mr.) Magdy F. Anis

MFA/seb
P.S. There is no consultation fee.

On January 12, 1989, Peter Lowenstein wrote to the Office of Attorney Ethics questioning in part the ethical propriety of the letter. Mr. Lowenstein's letter was subsequently referred to and received by this Committee on January 19, 1989.

The formal Complaint alleged that Respondents improperly engaged in written communication with a prospective client when they knew, or should have known, that the physical, emotional or mental state of the person was such

that the person could not exercise reasonable judgment in employing a lawyer, in violation of RPC 7.3(b)(1). The Complaint further alleged that Respondents engaged in false and misleading advertising by sending a letter that contained a material misrepresentation of fact or law, or omitted a fact necessary to make a statement considered as a whole not materially misleading, in violation of RPC 7.1(a)(1). The Complaint also alleged that Respondents failed to make reasonable efforts to ensure that they each conform to the Rules of Professional Conduct, in violation of RPC 5.1(a).

In the formal Answer, Magdy Anis admitted the authorship and sending of the letter to Peter Lowenstein. Fady Anis denied any specific knowledge of or participation in the preparation or sending of the letter. Respondents, who are brothers and the only attorneys in their firm, included in their Answer a separate defense that their actions were constitutionally protected, citing the opinion of the United States Supreme Court in Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed. 2d 475 (1988).

At the hearing it was developed that prior to the Locherbie crash, Respondents had contacted the Committee on Attorney Advertising regarding the sending of targeted direct-mail solicitation letters to prospective real estate clients. In this letter (Exhibit R-1) Respondents made reference to Shapero v. Kentucky Bar Association, supra, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475, which, in its broadest teams, held that a State cannot, consistent with the First and Fourteenth Amendments to the Constitution, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to be facing particular legal problems.

Magdy Anis testified that 11 letters identical to the one

sent to Peter Lowenstein were sent to the families of New Jersey crash victims. He indicated that the names and addresses had been obtained through the media.

On the issue of attorney's fees, Magdy Anis testified that New York Courts permit a fee of 33-1/3% on the total recovery in personal injury actions and supplied as an exhibit a copy of a New York Blumberg form reflecting that fee. He stated that he was familiar with the Montreal Protocol to the Warsaw Convention, which limited recovery to survivors of air crashes to $75,000, and that it was "virtually impossible" under the Convention to recover more. This being the case, it was his opinion that the Lowenstein estate could not receive anything above $250,000, which would perforce put it in the realm of a one-third recovery under New Jersey or New York Court Rules.

Magdy Anis summarized the fee aspect as follows:

> ...When I said we were in competition with New York, we are, yes, with respect to this case, but as I said before, with respect to New Jersey attorneys as well. The Montreal Protocol to the Warsaw Convention comes into play. That sets the cap of $75,000 on these type of cases and basically makes them strict liability case [sic]. So it won't take an Einstein, basically, to settle it.
>
> That's why I decided to cut down the fee. Instead of the 33-1/3% out of the first $250,000 it [sic] make it 25% and then 25% the next $250,000 and then 20% the last half million. [IT 58-20 to 59-6].[1]

---

[1] IT denotes transcript of hearing before Hearing Panel on June 22, 1989.

When asked why the letter did not specify the fee to be charged, Mr. Anis replied that it "didn't because I didn't want them to basically take this around and use it as a bidding game. You know, this attorney gave me this what will you give me, what will you give me." [1T 59-9 to 12].

On the issue of his experience, Magdy Anis testified that he had been admitted to the bar in 1987 and had taken classes in "international claims" prior to graduation from law school. He estimated that he had handled approximately 30 personal injury cases, none involving airlines, settling 10 without the filing of a complaint. He admitted that he had never tried a case to a judge or jury, had not been certified as a civil or criminal trial attorney and had not taken any continuing legal education courses.

Fady Anis testified that prior to his travelling outside the State, he was aware that his brother intended to send letters to the victims' families. He did not see the letters prior to their transmission by his brother and learned that they had in fact been sent only after his return on January 8, 1989. While he and his brother had previously agreed in principle regarding the sending of such letters, he would have preferred to have seen them before they were mailed.

Fady Anis further testified that he and his brother believed they had the right, under Shapero v. Kentucky Bar Association, supra, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed. 2d 475, to send the letter. He stood by it, even though it may have been a "little inartful." He also said that the portion of the letter referring to fees was accurate, even though "[i]t may not have been worded in the best way possible... ." [1T 124-2].

Concerning his experience, Fady Anis stated that he had been admitted to the New Jersey Bar in 1984 and had been

involved in approximately 20 personal injury cases. Like his brother, as of the date the Lowenstein letter was sent, he had never tried a personal injury case to either a judge or jury.

Following the hearing, Presenter filed a motion to amend the Complaint to include a count alleging that Respondents' letter contained a material misrepresentation of fact, in violation of RPC 7.1(a)(1). Specifically, Presenter complained that the letter stated "both my partner and myself are experienced practitioners in the personal injury field," when in fact they both testified that following their respective admissions to the bar in 1984 and 1987, their experience had been minimal and neither had ever tried a personal injury case to either a judge or jury.

Respondents resisted this motion, relying upon In the Matter of John Ruffalo, Jr., 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 2d 117 (1988) reh. den. 391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed. 2d 117 (1988). They argued that Presenter or the Committee could have raised the issue prior to the commencement of the hearing had either one simply consulted the "Lawyers Diary" to determine the extent of time both had been in practice.

Finding that "Lawyers Diary" dates of admission do not bespeak the quantum of experience of an admitted attorney, and concluding that the Ruffalo opinion was inapposite to the matter before it, the Committee granted the motion and filed the Amended Complaint.

CONCLUSION AND RECOMMENDATION

Upon review of the full record, the Committee is satisfied by clear and convincing evidence that Respondents engaged in false and misleading advertising in violation of RPC 7.l(a)(1). The Committee is also satisfied that Respondents sent a written communication to a prospective client for the purpose of obtaining professional employment; in violation of RPC 7.3(b). For the following reason, however, the Committee does not conclude that Respondents' actions in sending the solicitation letter to this recipient constituted unethical conduct.

In Shapero v. Kentucky Bar Association, supra, 486 U.S 466, 108 S.Ct. i916, 100 L.Ed. 2d 475 the United States Supreme Court restated the principles governing attorney advertising, noting that such advertising is in the category of constitutionally protected commercial speech, and that if it is not false or deceptive, may be restricted only in the service of a substantial governmental interest. Therefore, state rules which are designed to prevent the potential for deception and confusion may be no broader than reasonably necessary to prevent the perceived evil.

In Shapero, a Kentucky attorney sought Bar Association approval of a letter to be sent to potential clients known to have pending foreclosure suits. The letter advised that they might, under Federal law, forestall their creditors and secure additional time to pay their debts. The Kentucky State Bar Association did not find the letter to be false or misleading but nevertheless disapproved it since it violated a blanket ban on all targeted mail solicitation. The Kentucky Supreme Court affirmed. Shapero v. Kentucky Bar Association, 726 S.W. 2d 299 (Ky. 1987).

The United States Supreme Court noted that "[i]n

assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." Shapero v. Kentucky Bar Association, supra, 486 U.S. at 475, 108 S.Ct. at 1922, 100 L.Ed. 2d at 485. In doing so, the Court distinguished written communications from in-person solicitation, which was proscribed by Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed. 2d 444 (1978). The Court then stated that the blanket prohibition against in-person solicitation turned on two factors. First, face-to-face solicitation was a practice rife with the possibility of overreaching, invasion of privacy, the exercise of undue influence and outright fraud. Second, the difficulty in policing face-to-face solicitation, because it is not visible or otherwise open to public scrutiny. Shapero v. Kentucky Bar Association, supra, 486 U.S. at 475, 108 S.Ct. at 1922, 100 L.Ed. 2d at 485.

The Court opined that "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded" and does not "invade the recipient's privacy anymore than does a substantively identical letter mailed at large." Id at 475-476, 108 S.Ct. at 1923, 100 L.Ed. 2d 486. While a letter that is targeted or personalized to the recipient presents an increased risk of deception and could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case, implicitly suggest that the recipient's legal problem is more dire than it really is, and even contain erroneous legal advice, it does not warrant a blanket ban merely because lawyers might be presented with opportunities for isolated abuses.

The Court observed that a state could regulate such abuses and minimize mistakes through less restrictive and more precise means. For example, a state could require an attorney to file any solicitation letter with a state agency. In this regard, the Court noted that there was no evidence that the scrutiny of

targeted solicitation letters would be appreciably more burdensome or less reliable than the scrutiny of other advertisements. The court also suggested that a state could require the lawyer to identify the letter as an advertisement.[2]

Consequently, the Committee is satisfied that a targeted, direct-mail solicitation letter, insofar as it does not mislead or have the potential to deceive, is entitled to First Amendment protections. Accordingly, Count I of the Complaint, alleging a violation of RPC 7.3(b)(1), is dismissed.

However, the Committee is satisfied by clear convincing evidence that Respondent did engage in false and misleading advertising and related unethical conduct set forth in Counts II, III and IV of the Amended Complaint for which discipline is warranted.

Admittedly, Respondents intentionally emphasized and

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[2] In response to Shapero, the Committee on Attorney Advertising recommended and the New Jersey Supreme Court adopted amendments to RPC 7.3(b)(4) which would allow such letters with certain restrictions. Specifically, the revised RPC 7.3(b)(4), adopted June 29, 1990, to be effective September 4, 1990, permits the sending of targeted solicitation letters provided that the letters (1) bear the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text; (2) contain the following notice at the bottom of the first page of text; "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and (3) contain an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising.

highlighted the following paragraph of their letter:

> Before retaining any other attorney, it would be worth your while to contact us, since we will substantially reduce the customary one-third fee that most other attorneys routinely charge.

It is manifest that this language was designed to make the retention of Respondents financially attractive, but it did not state what the fee would be and failed to indicate any range of fees for the legal services to be rendered. Nor did it set forth a reasonable disclosure of all relevant variables and considerations so that this blanket statement would not be misunderstood or be deceptive. Indeed, it suggests that other attorneys would charge a one-third fee on a recovery, even though, in the event of a recovery in excess of $250,000, that amount could not be charged absent specific court order. See R. 1:21-7.

Respondents testified that they intended to charge a fee of 25% of any recovery, but deliberately failed to disclose this intention to the potential client lest the client use that figure to "shop around" amongst other attorneys for a still lesser fee. In our view, this intentionally emphasized statement transcends mere advertising tactics and has the real potential to beguile unsophisticated members of the public to employ Respondents with the implicit promise of some unstated fee advantage.

The Committee finds even more brazen and deceptive the unwarranted boast that "[b]oth my partner and myself are experienced practitioners in the personal injury field, and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants."

Notwithstanding Magdy Anis' testimony that he felt the

claim would be capped at $75,000 by the Montreal Protocol of the Warsaw Convention, and that it would not "take an Einstein, basically, to settle it"--we know not the correctness of these assertions--the fact remains that Respondents misrepresented their professional backgrounds with the intention of procuring employment in a potentially sophisticated litigation. Magdy Anis was admitted to the bar in 1987, his brother Fady in 1984. Neither was a certified civil or criminal trial attorney, had ever tried a single case to a judge or jury, or handled a personal injury matter involving negligence on the part of an airline. Respondents' protestations or assertions to the contrary notwithstanding, there is absolutely no basis in the record to suggest to the public that they were experienced practitioners in the personal injury field in general and, implicitly, international aircraft litigation in particular. Their perception of themselves, if such was the case, was clearly erroneous. The. representation as to their experience constituted a false and misleading communication about these lawyers and/or their services in violation of RPC 7.1(a)(1).

The Committee is also satisfied that Respondents jointly failed to make reasonable efforts to ensure that, as the sole members of the firm, they undertook measures to satisfy themselves that they were conforming to the Rules of Professional Conduct in authoring and sending a letter with misleading statements, in violation of RPC 5.1(a).

The rules governing attorney advertising are designed to prevent harm and protect consumers. See Ohralik v. Ohio State Bar Association, supra, 436 U.S. at 463-464, 98 S.Ct. at 1922-1923, 56 L.Ed. 2d at 444. When a consumer chooses a lawyer through the advertising process, that individual has a right to expect that the lawyer possesses the background and experience claimed. Misleading advertising, such as Respondents' solicitation letter, creates danger that consumers

will make uninformed or ill-advised choices of counsel.

The retention of legal counsel is fundamentally different from the purchase and use of ordinary consumer products. Petition of Felmeister & Isaacs, 104 N.J. 515, 536-537 (1987). The choice of an attorney is far more important than that of a laundry detergent or household appliance. Legal representation may affect a consumer's basic rights and possibly have serious long-term consequences. Therefore, a consumer is more likely to be swayed or influenced by an attorney's advertisement than that of a consumer products manufacturer.

Though no client was damaged by virtue of Respondents' false and misleading communication, some form of discipline is necessary and appropriate. The purpose of discipline is not the punishment of the offender, but "protection of the public against the attorney who cannot or will not measure up to the high standards of responsibility required of every member of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 75 N.J. 321, 325 (1978). "The severity of discipline to be imposed must comport with the seriousness of the ethical infractions in light of all the relevant circumstances." In re Nigohosian, 86 N.J. 308, 315 (1982).

Magdy Anis admitted that he authored and caused the solicitation letter to be sent to Mr. Lowenstein and ten other families of victims. In Mr. Lowenstein's case, the letter was dated only one day after he received verification of his son's death and apparently sent before the body was returned to the United States.

Fady Anis stated that although he did not see the letter before it went out, he had previously agreed in principle to the sending of such letters. He further stated that even though the letter "may not have been worded in the best way possible..."

and may, in fact, have been a "little inartful," he fully stood by it.

The Committee notes that neither Magdy nor Fady Anis acknowledged any wrongdoing whatsoever. Rather, they contended that while the letter could have been more articulately drawn, there was no misstatement of fact and no discipline is warranted. The Committee strongly disagrees. Misrepresentations of experience or ability are among the most serious and potentially damaging communications an attorney can make. At best, they can result in an uninformed choice of counsel. At worst, they may ultimately affect the client's basic rights and have serious long-term consequences. Discipline must, therefore, be imposed.

Accordingly, the Committee recommends that Respondents be publicly reprimanded.

DATED: 9/26/90

Francis X. Crahay, Esq.,
Chair
COMMITTEE ON
ATTORNEY ADVERTISING

(COMMITTEE - LETTERHEAD)

September 22, 1988

RE: INQUIRY POSED TO THE ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Dear Mr. Anis:

Please be advised that the Committee on Attorney Advertising has tabled consideration of all inquiries regarding targeted mailings pending the New Jersey Supreme Court's review of RPC 7.3(b) in light of Shapero v. Kentucky Bar Association, 108 S.Ct. 1916, 56 U.S.L.W. 4532 (1988).

However, the Committee has authorized me to advise you that contemplated advertising does not require the prior approval of the Committee. Therefore, if you believe your proposed solicitation letter falls within the protection afforded by Shapero, you should be guided by your interpretation of said decision. Unfortunately, the Committee can offer you no further guidance at this time.

Additionally, in order for a matter to be considered by the Committee on Attorney Advertising, the inquiry must be submitted pursuant to the procedures set forth in R. 1:19A-1 et seq. Specifically, I would like to call your attention to the requirement of supplying a brief giving the inquirer's views on the issue, specifying the disciplinary or court rules involved, and citing pertinent opinions of this or other ethics committees,

court opinions or other authorities. If you desire to go forward with this inquiry, kindly resubmit the matter as outlined above.

Very truly yours,
COMMITTEE ON ATTORNEY ADVERTISING
Israel David Dubin, Esq.
Committee Secretary

LAW OFFICES
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A PROFESSIONAL CORPORATION
55 WEST MAIN STREET
P.O. BOX 4767
FREEHOLD, NEW JERSEY 07728

July 31, 1989

Israel David Dubin, Secretary
Committee on Attorney Advertising
CN 037 - Hughes Justice Complex
Trenton, N.J. 08625

RE: CAA Index 1-89
In the matter of Anis & Anis

Dear Mr. Dubin:

As you know, Mr. Monahan has filed a motion to expand the charges against my client. I tried to reach you on Monday, July 31, 1989 and was advised you were not available. I called Chairman Crahay, since I wish to oppose the motion and at the same time, because of that, delay the filing of our brief in this matter. Chairman Crahay authorized me to advise you that the Committee will set a new deadline for the filing of our brief after the Committee has dealt with your motion.

I wish to go on record as opposing the motion and I call the attention of the Committee to the Supreme Court opinion in I/M/O John Ruffalo, Jr., 39 U.S. 544 (1968). In the case at bar, the presenter or the Committee could have simply raised

the same issue prior to the commencement of the hearing, after looking at the lawyers diary to determine the extent of time both my clients have been in practice. Instead, at the hearing, over my objection, questions were asked regarding the extent of their practice. We believe that fundamental fairness dictates that the resulting motion be denied.

Respectfully,
MICHAEL D. SCHOTTLAND

MDS:ls
cc: Pat J. Monahan, Jr., Designated Presenter
Francis Crahay, Esq., Chairman
Messrs. Magdy & Fady Anis

Supreme Court, U.S.
FILED
MAY 8 1992
OFFICE OF THE CLERK

(2)

No. 91-1609

In The

Supreme Court of the United States

October Term, 1991

MAGDY F. ANIS,

Petitioner,

v.

NEW JERSEY COMMITTEE ON ATTORNEY ADVERTISING; DISCIPLINARY REVIEW BOARD OF THE STATE OF NEW JERSEY; HONORABLE JUSTICES OF THE NEW JERSEY SUPREME COURT,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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(Counsel of Record)
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether petitioner can claim First Amendment protection for sending a false and misleading solicitation letter to the family of an air disaster victim the day after their son's body was identified?

2. Whether the Supreme Court of New Jersey may, consistent with the First Amendment, place reasonable, limited time restrictions on attorneys' ability to make targeted direct mailings soliciting business from the families of victims of recent disastrous accidents?

3. May a State attorney disciplinary committee amend charges against an attorney, based on newly discovered evidence which was elicited at a disciplinary hearing, but which was not presented as a part of the attorney's defense to the original charges, and where the attorney had a full opportunity to present a defense to the amended charges before the Committee and before the State Supreme Court?

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N.J.S.Ct.R. 1:21-7 ..... 2, 8

N.J.S.Ct.RPC 7.1(a)(1) 2

N.J.S.Ct.RPC 7.3(b)(1) ..... *passim*

COUNTERSTATEMENT OF THE CASE

This case arises from a disastrous incident on December 21, 1988, in which a Pan American aircraft exploded over Lockerbie, Scotland. One of the passengers aboard the airplane was Alexander Lowenstein, a college student from Morristown, New Jersey. On January 4, 1989, one day after Alexander Lowenstein's remains were identified, petitioner Magdy F. Anis ("petitioner") sent a personalized, targeted solicitation letter to Alexander's father, Peter Lowenstein (Pa7).

Petitioner's letter represented that he and his law partner were "experienced practitioners in the personal injury field, and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants." (Pa7). The letter also offered to represent Mr. Lowenstein at an allegedly reduced fee, which petitioner represented would be below the "customary one-third fee that most other attorneys routinely charge." (Pa8). On January 12, 1989, Peter Lowenstein filed an ethics complaint against petitioner.* As a result of the filing of his complaint, the Committee on Attorney Advertising filed a formal complaint against petitioner alleging that he had violated *N.J.S.Ct.RPC* 7.3(b)(1), which provides that

> (b) A lawyer shall not contact, or send a written communication to, a prospective client for

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* The complaint originally also named petitioner's brother, who was his law partner. After proceedings before the Disciplinary Review Board, however, those charges were dismissed (Pa10).

> the purpose of obtaining professional employment if:
>
> > (1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

Petitioner was also charged with engaging in false and misleading advertising by sending a letter that was misleading and contained material misrepresentations, in violation of *N.J.S.Ct.RPC* 7.1(a)(1), in that the letter failed to indicate the amount of petitioner's actual fee, failed to indicate any range of fees for the legal services to be rendered, and indicated that the customary fee charged by other attorneys would be one-third, notwithstanding *N.J.S.Ct.R.* 1:21-7, which prohibits charging such a high fee on a recovery in excess of $250,000 (Pa8 to Pa9).

During the course of the disciplinary hearing before the Committee on Attorney Advertising, the Chairman of the Committee addressed several questions to petitioner concerning the extent of his experience in the practice of law. Petitioner did not raise the issue of his own experience as part of his defense. Rather, the Chairman raised the issue in the course of attempting to determine the basis for petitioner's purported belief that the maximum possible recovery in the case would have been $75,000 (Pb20 to Pb21). The hearing lasted one day; several days after the hearing, the Committee permitted the complaint to be amended to include an additional allegation that petitioner had misrepresented the level of his legal experience in the solicitation letter (Pa47). Petitioner was given the opportunity for additional hearing days in

which to respond to that amended complaint, but he declined to take advantage of that opportunity (Pb7).

In its decision, the Committee found by clear and convincing evidence that petitioner had engaged in false and misleading advertising. The Committee found that petitioner's letter had misrepresented the permissible fee to be charged in a personal injury case of the type involved here, and misrepresented both the professional background of petitioner and his law partner. The Committee found, and it was undisputed, that petitioner had been admitted to the bar only one year prior to sending the letter in question, that neither he nor his partner was a certified civil trial attorney, and that neither of them had ever tried a case to a judge or a jury or handled a personal injury matter involving the negligence of an airline (Pa9). The Committee recommended that petitioner be publicly reprimanded. The Disciplinary Review Board, which by Supreme Court rule reviews the disciplinary recommendations of the Committee, agreed that petitioner had engaged in unethical conduct, but recommended a private reprimand instead of a public reprimand (Pa10).

Upon review of the decision of the Disciplinary Review Board, the Supreme Court of New Jersey determined that a public reprimand was the appropriate discipline. After reviewing the increasing problem of "lawyers and their agents preying on victims of disaster" (Pa5), the Court determined that its rule prohibiting direct solicitation of potential clients at a time when their physical, emotional or mental state is such that they could not exercise reasonable judgment in employing an attorney,

was consistent with the First Amendment. The Court reasoned that

> Whatever doubts may exist about the outer limits embraced by *RPC* 7.3(b)(1), any reasonable lawyer would conclude that an obsequious letter of solicitation delivered the day after a death notice would reach people when they 'could not exercise reasonable judgment in employing a lawyer. . . . ' *RPC* 7.3(b)(1). [Pa14]

In order to ensure that the rule was as narrowly tailored as possible to the state interest it served, the Court in its decision indicated that it was referring the rule to the Committee on Attorney Advertising for further study to determine how the rule might be made more precise. Pending the outcome of that reconsideration, the Court determined that it would not impose discipline on attorneys for truthful solicitation letters sent "more than two weeks after such a disaster occurs and loss becomes known." (Pa17).

Based on an independent review of the record, the Supreme Court of New Jersey also found by clear and convincing evidence that petitioner had engaged in misleading advertising by misstating the customary fee permitted in an airline negligence case, and by falsely implying "that he was experienced in litigating aircraft accidents." (Pa17 to Pa18). With respect to the latter claim, the Court found that "nothing could be further from the truth." (Pa18). Finally, the Court found that the amendment of the charges before the Committee did not violate due process, because petitioner had ample opportunity to respond to the charges and was not prejudiced by the amendment (Pa9).

SUMMARY OF ARGUMENT

Petitioner Magdy F. Anis ("petitioner") cannot claim First Amendment protection for his advertising in this case, because the targeted solicitation letter which he sent to the family of a recently deceased air disaster victim was fraudulent and misleading as well as overreaching. Hence, his commercial speech in this case is not entitled to First Amendment protection, and he cannot invoke the overbreadth doctrine to challenge the rule on behalf of persons whose advertisements are not false and misleading. Moreover, the challenged disciplinary rule, *N.J.Sup.Ct.RPC* 7.3(b)(1), is constitutional, because it represents a limited restriction on the timing of attorney advertising, rather than a blanket prohibition on targeted, direct mail solicitation. As construed by the Supreme Court of New Jersey, the rule provides a limited, two week "breathing space" for the families of victims of disastrous accidents, during which attorneys are not permitted to target them with direct mail solicitations. The rule is clearly constitutional and does not merit scrutiny by this Court, particularly since the Supreme Court of New Jersey is currently in the process of reviewing the rule to determine whether its limitations can be further fine-tuned. Finally, the amendment of the disciplinary charges against petitioner did not violate due process, since information concerning the petitioner's lack of experience was brought out on questioning by the Chairman of the Attorney Advertising Committee, and was not presented by the petitioner as part of his defense; hence, unlike *In re Ruffalo*, 390 *U.S.* 544 (1968), the disciplinary proceeding did not serve as a "trap" for petitioner in which he would inculpate himself while presenting a defense to the original charges. Rather, the amended

charge was based on newly discovered, but undisputed, facts which were tangential to the original charge.

ARGUMENT

POINT I

THE PETITION SHOULD BE DENIED BECAUSE PETITIONER'S ADVERTISEMENT IN ITS TOTALITY WAS OVERREACHING, FRAUDULENT AND MISLEADING, AND THEREFORE UNWORTHY OF FIRST AMENDMENT PROTECTION.

It is well established that the overbreadth doctrine does not apply to First Amendment challenges involving commercial speech. *Bd. of Trustees, S.U.N.Y. v. Fox*, 492 *U.S.* 469, 483-484 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 *U.S.* 466, 478 (1988); *Bates v. State Bar of Arizona*, 433 *U.S.* 350, 380 (1977). Therefore, a petitioner seeking to challenge a restriction on commercial speech must show that his particular advertisement is worthy of First Amendment protection. A petitioner whose advertisement is false and misleading, and therefore unworthy of First Amendment protection, cannot assert the rights of those whose conduct might be entitled to protection. *See, e.g., Bd. of Trustees, S.U.N.Y. v. Fox, supra*, 492 *U.S.* at 483-484; *In re R.M.J.*, 455 *U.S.* 191, 200 (1982) (false and misleading advertisement is not protected by the First Amendment and may be prohibited).

In this case, petitioner's letter, taken as a whole, is a classic example of misleading advertising for which he was properly reprimanded by the Supreme Court of New Jersey. Shortly after a massive aircraft disaster, and one day after Peter Lowenstein's son's body was identified,

petitioner sent Mr. Lowenstein a letter seeking to represent him against the airline and other parties. The letter, which was personalized and referred to the dead son by name,* grossly misrepresented petitioner's level of experience, assured Mr. Lowenstein of petitioner's belief that he could obtain a successful result in litigation, and offered an allegedly reduced fee, below what petitioner falsely represented was the "customary one-third fee that most other attorneys routinely charge." (Pb5). Nothing in this Court's past decisions mandates First Amendment protection for this sorry example of overreaching and abuse.

This Court has repeatedly ruled that false and misleading advertising may be prohibited. *See, e.g., In re R.M.J., supra; Zauderer v. Office of Disciplinary Counsel,* 471 *U.S.* 626 (1985). Petitioner's letter in this case was unquestionably false and misleading. Petitioner represented in the letter that he and his partner were experienced in personal injury litigation. In fact, neither petitioner nor his partner had ever handled an aircraft accident case; nor, for that matter, had either partner ever actually tried a case of any kind before either a jury or a judge. In fact, at the time that petitioner sent the letter, he had been admitted to the practice of law for only one year. Particularly in combination with petitioner's assurances to Mr. Lowenstein that he and his partner could

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* This Court recognized in *Shapero, supra,* that a "personalized" letter presents an increased risk of deception, because, *inter alia,* it could lead the recipient to overestimate the attorney's familiarity with the case. 486 *U.S.* at 476.

obtain a successful result in the proposed litigation, this misrepresentation was inexcusable.*

In addition, petitioner represented that the "customary fee" charged by other attorneys was one-third of the recovery (Pb5). The Supreme Court of New Jersey correctly found that this statement was misleading, since the New Jersey Court Rules explicitly prohibit attorneys from charging a one-third fee for recoveries over the amount of $250,000. *N.J.S.Ct.R.* 1:21-7. The rule limits the fee to 25% on recovery between $250,000 and $500,000, and 20% of the next $500,000 recovered. The New Jersey Supreme Court properly discounted petitioner's claim that the Warsaw Convention would limit Mr. Lowenstein's potential recovery to $75,000. As the Court noted, the Warsaw Convention does not apply to willful misconduct by an airline (Pa17). Moreover, petitioner's letter explicitly referred to the possibility of suing "other possible defendants" against whom petitioner believed he could obtain "a favorable outcome." (Pa7). Clearly, a State Supreme Court is entitled to hold attorneys to a high standard of truthfulness in their advertising. Moreover, as this Court recognized in the case of *In re R.M.J., supra,* 455 *U.S.* at 200:

> Because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other

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* The Supreme Court of New Jersey has previously imposed the same discipline meted out here, a public reprimand, for misrepresentation by an attorney of his level of experience in an advertisement. *Matter of Caola,* 117 *N.J.* 108 (1989).

> advertising may be found quite inappropriate in legal advertising. [*quoting Bates v. State Bar of Arizona*, 433 *U.S.* 350, 383 (1977)].

The fact that many ordinary citizens, being unaware of the limits that the New Jersey Court Rules place on attorney fees, would "perceive a one-third fee in contingency cases" (Pb27) does not excuse petitioner's misrepresentation here. If anything, it exacerbates its seriousness. Petitioner had a duty to accurately state the facts in his advertisement, not play upon the public's misconceptions.*

For all of these reasons, petitioner's advertisement here clearly fell outside the protection of the First Amendment. Not only did he send a personalized targeted letter to an air disaster victim's grieving family, at a moment of their extreme distress and vulnerability, but he compounded this overreaching with false and misleading statements concerning his fees and experience. This Court therefore need not, and should not, entertain petitioner's First Amendment attack on *N.J.Sup.Ct.RPC* 7.3(b)(1).

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* In *Peel v. Attorney Reg. and Disciplinary Com'n*, 110 *S.Ct.* 2281 (1990), Justice White noted that five Justices of this Court found Peel's listing of his certification as a trial specialist to be either misleading or potentially misleading. Petitioner's conduct here is far more egregious than the conduct at issue in *Peel*. (110 *S.Ct.* at 2297, White, J., dissenting).

POINT II

THE PETITION SHOULD BE DENIED BECAUSE *N.J.Sup.Ct.RPC* 7.3(B)(1), AS CONSTRUED BY THE SUPREME COURT OF NEW JERSEY, IS A REASONABLE RESTRICTION ON THE "TIME, PLACE AND MANNER" OF ATTORNEY ADVERTISING, WHICH IS CONSISTENT WITH THE FIRST AMENDMENT, AND BECAUSE THE RULE IS CURRENTLY UNDER RECONSIDERATION TO DETERMINE WHETHER A STILL MORE PRECISE LIMITATION MAY BE CRAFTED.

As an essential element of its power to protect the public health, safety and welfare, a State has "broad power[s] to establish standards for licensing practitioners and regulating the practice of professions. . . . " *Goldfarb v. Virginia State Bar*, 421 *U.S.* 773, 792 (1975). The "State's compelling interest" in the regulation of the professions is "especially great" with regard to the legal profession since lawyers are essential to the governmental function of administering justice and have historically been "officers of the courts." *Ibid. See also Ohralik v. Ohio State Bar Association*, 436 *U.S.* 447, 459 (1978); *In re Primus*, 436 *U.S.* 412, 438 (1978). The State's interest in regulating the legal profession includes an interest in maintaining public confidence in the propriety of the conduct of those associated with the administration of justice. *IBM Corp. v. Levin*, 579 *F.*2d 271, 283 (3d Cir. 1978).

In ruling on cases involving attorney advertising, this Court has repeatedly indicated that the State may further its legitimate interest in regulating the legal profession by placing "reasonable restrictions on the time, place, and manner of advertising." *Bates v. State Bar of Arizona*, 433 *U.S.* 350, 384 (1977); *In re Primus, supra*, 436 *U.S.* at 438; *In*

re R.M.J., 455 *U.S.* 191, 201 n. 13 (1982). The Court has not restricted the State's power over professional advertising to prevention of misleading or deceptive practices. In *Friedman v. Rogers*, 440 *U.S.* 1, 9 (1979), the Court stressed that

> 'some forms of commercial speech regulation are surely permissible.' *Virginia Pharmacy, supra*, at 770, 48 *L.Ed.*2d 346, 96 *S.Ct.* 1817; *accord Bates, supra*, at 383,. . . . For example, restrictions on the time, place and manner of expression are permissible provided that 'they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.' [citation omitted]. *Equally permissible* are restrictions on false, deceptive, and misleading commercial speech. [emphasis added].

Likewise, in *In re R.M.J., supra*, 455 *U.S.* at 207, the Court indicated that in addition to preventing misleading advertising, "[t]here may be other substantial state interests as well that will support carefully drawn restrictions." *See also Central Hudson Gas v. Public Service Com'r*, 447 *U.S.* 557, 571 (1980). These interests include restricting advertising which presents a significant potential for overreaching of prospective clients. *Ohralik, supra*, 436 *U.S.* at 462.

Contrary to petitioner's contentions, *Shapero v. Kentucky Bar Ass'n*, 486 *U.S.* 466 (1988), does not prohibit reasonable restrictions on the timing of direct mail solicitations by attorneys. The issue in *Shapero* was whether the State may "categorically prohibit" attorneys from

soliciting business by sending "truthful and nondeceptive letters to potential clients known to face particular legal problems." *Id.* at 468. The Court reiterated its longstanding rule that " 'commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.' " *Id.* at 472, *quoting Zauderer v. Office of Disciplinary Counsel*, 471 *U.S.* 626 (1985). In *Board of Trustees, S.U.N.Y. v. Fox, supra*, the Court reaffirmed the State's power to regulate the time, place and manner of advertising, provided that the restrictions are narrowly tailored to serve a significant governmental interest. The Court in *Fox* ruled, however, that the State's regulations need not encompass the least restrictive alternative so long as their scope is "in proportion to the [State] interest served." 492 *U.S.* at 478. The State regulation at issue here regulates the timing of direct mail solicitations, consistent with this Court's prior rulings.

In its decision below, the Supreme Court of New Jersey reviewed the increasing problem of abusive attorney solicitation of recent disaster victims, the potential this activity has for inflicting unnecessary additional emotional distress on survivors, and the potential for overreaching. The Court made a finding that families of disaster victims are vulnerable and would have difficulty making a reasoned judgment as to the retention of counsel. The Court found that "an ordinarily prudent attorney would recognize that within the hours and days following a tragic disaster, families would be particularly weak and vulnerable." 599 *A.*2d 1265, 1270 (1992). The Court

further properly reasoned that "[n]othing in the Constitution, . . . requires us to countenance solicitation that intrudes upon victims or their families in the initial throes of their grief." *Id.* at 1271. Justice Handler, concurring, further emphasized the rule's purpose to prevent "harassment and overreaching" of potential clients. *Id.* at 1273. For the future guidance of the Bar, the Court made a reasoned determination, for interim purposes, that it would not enforce the rule for advertisements sent out more than two weeks following the occurrence of a disaster and the discovery of loss by the target of the solicitation. The Court, however, referred the rule to a committee for further review to determine whether the limitation could be made more precise.

Faced with a similar issue, the Supreme Court of Florida has recognized the reasonableness of giving disaster victims and their families a short "breathing space" during which attorneys would not be permitted to solicit their business. *The Florida Bar: Petition to Amend Rules*, 571 *So.*2d 451 (Fla. 1990). That Court ruled that consistent with the decisions in *Shapero* and *Fox*, mailings could be restricted to no earlier than 30 days after the incident giving rise to the injury. Likewise, in *Spencer v. Honorable Justices of Supreme Ct. of Pa.*, 579 *F. Supp.* 880 (E.D. Pa. 1984), aff'd 760 *F.*2d 261 (3d Cir. 1985), the court recognized that a state could ban direct mailings in identified circumstances in which direct mail recipients could be particularly vulnerable or susceptible to the persuasive influence of a targeted attorney solicitation letter.*

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* *Matter of Von Weigen*, 470 *N.E.*2d 838 (N.Y. 1984), cited by petitioner (Pb12), involved a "blanket prohibition of mail

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Clearly, the State has a substantial interest in preventing attorneys from taking unfair advantage of potential clients. *Ohralik v. Ohio State Bar Assn., supra,* 436 *U.S.* at 462. The Court below reasonably determined that the period immediately after a disaster presents an unusually high risk of overreaching and exploitation. The Court also reasonably determined that the State has an interest in holding attorneys to some minimal standards of decency in their conduct toward potential clients, if for no other reason than to uphold public confidence in the integrity of the Bar and the justice system of which attorneys are an integral part. *Ohralik, supra,* 436 *U.S.* at 460-461; *IBM Corp. v. Levin, supra,* 579 *F.*2d at 283. Requiring attorneys to wait a few days before soliciting

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solicitation of accident victims", *Id.* at 841, rather than the very limited timing restriction at issue here. Moreover, the Court there found no "history that the practice has led to abuses." *Id.* at 843. Here, the Supreme Court of New Jersey has found evidence of a growing pattern of abuse which needed to be addressed (Pa5 to Pa6). The case of *Unnamed Attorney v. Attorney Grievance Commission,* 545 A.2d 685 (Md. 1988) concerned a motion to quash a subpoena which was supposedly aimed at determining whether petitioner had violated the confidentiality of medical records in order to obtain the names of recent accident victims. In passing upon the validity of the subpoena, the Court questioned the validity of a rule facially similar to *N.J.S.Ct.RPC* 7.3(b). The Court did not, however, directly rule upon the validity of the restriction, and its validity was tangential to the Court's central finding that the subpoena constituted a "fishing expedition" based upon a "bald supposition" that petitioner had improperly obtained confidential medical records. *Id.* at 691. Moreover, the Maryland rule was not subject to the narrowing construction which the Supreme Court of New Jersey has placed upon *N.J.S.Ct. RPC* 7.3(b)(1).

business from the grieving families of disaster victims, giving the survivors a chance to regain their composure sufficiently to be able to make a reasoned judgment as to the retention of counsel, is a reasonable "time, place and manner" restriction on attorney advertising. The rule serves a substantial State interest in protecting potential clients against overreaching and harassment and, as construed by the Supreme Court of New Jersey, is narrowly tailored to directly serve that interest. *See, e.g., Bd. of Trustees, S.U.N.Y. v. Fox, supra; Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 *U.S.* 328, 339 (1986) (Supreme Court will abide by the narrowing construction given to State regulations or statutes by the State courts). As this Court held in *Fox*, so long as the rule restricts speech only "in proportion to the [State] interest served," 492 *U.S.* at 478, it will be upheld, even if it is not the least restrictive possible alternative. *Id.* Plainly, the rule in question here meets the standard of *Fox* and is consistent with this Court's ruling in *Shapero*. Moreover, in its decision the Supreme Court of New Jersey indicated that it is currently reconsidering the rule to determine whether an even more precise limitation can be crafted. 599 *A.*2d at 1271.

For all of the reasons set forth above, it is clear that *N.J.S.Ct.RPC.* 7.3(b)(1) is valid on its face and would have been constitutionally applied to petitioner's conduct, even if, as discussed in Point I, *supra*, his advertising letter had not been false and misleading. Consequently, there is no reason for this Court to grant the petition for a writ of certiorari. Moreover, since the Supreme Court of New Jersey is currently reconsidering this rule, this Court should refrain from granting the petition, even if it were

otherwise inclined to do so, because the scope of the final rule to be adopted by the State Court is not yet known.

POINT III

THE AMENDMENT OF THE CHARGES AGAINST PETITIONER WAS CONSISTENT WITH DUE PROCESS, BECAUSE THE AMENDMENT WAS NOT BASED UPON THE DEFENSE PRESENTED BY PETITIONER AT THE DISCIPLINARY HEARING BELOW, AND BECAUSE PETITIONER HAD AMPLE OPPORTUNITY TO PRESENT A DEFENSE TO THE CHARGE BOTH BEFORE THE COMMITTEE ON ATTORNEY ADVERTISING AND BEFORE THE SUPREME COURT OF NEW JERSEY.

The Supreme Court of New Jersey issued a public reprimand to petitioner because, among other things, his solicitation letter grossly misrepresented his level of experience. Although he represented that he was experienced in the handling of personal injury matters, at the time he sent the letter petitioner in fact had only been admitted to practice law for one year, had never handled an aircraft accident case, and had never tried a case of any sort before either a jury or a judge. Petitioner's efforts to invoke *In re Ruffalo*, 390 *U.S.* 544 (1968) in his defense are unavailing. In *Ruffalo*, an attorney was charged with using an agent to solicit business. His defense to the charge was that the supposed "agent" was really only an investigator, who was a railroad employee moonlighting by working for Ruffalo. He was then charged, based solely on his own defense testimony, with improperly hiring a railroad employee to investigate the employee's own employer railroad. Ruffalo was disbarred based on the amended charge. This Court found

that the amendment of the charge, based on Ruffalo's own defense, violated due process.

As this Court has recognized, however, *Ruffalo* does not stand for the proposition that attorney disciplinary charges can never be amended to include new charges after the disciplinary hearing has commenced. In fact, in *Zauderer, supra,* an attorney was charged, among other things, with misleading advertising based on his offer to defend drunk driving cases and forego his fee if the client was found guilty. The State Supreme Court found that the ad was misleading, but on different grounds than those originally relied on by the Office of Disciplinary Counsel. Zauderer raised *Ruffalo* as a defense. This Court rejected his arguments and distinguished *Ruffalo* as follows:

> The feature of that case that was particularly offensive was that the change [in the charges] was such that the very evidence put on by the petitioner in defense of the original charges became, under the revised charges, inculpatory. Thus, in that case, the original charges functioned as a 'trap' . . . in this case the variance between the theory of the Office of Disciplinary Counsel and the Board of Bar Commissioners had no such prejudicial effect on appellant. [471 *U.S.* at 655 n. 18].

As in *Zauderer,* petitioner here was charged with false and misleading advertising based on one particular advertisement, here his letter to Mr. Lowenstein. During the hearing, the Chairman of the Attorney Advertising Committee asked petitioner several questions about his experience, in the course of trying to determine why petitioner thought that the Warsaw Convention would limit recovery to $75,000, an award subject to a one-third

contingency fee. Testimony concerning petitioner's experience was not a part of petitioner's defense; he did not, for example, seek to claim lack of experience as a mitigating factor in defending against the charges. Hence, unlike *Ruffalo*, the original charge did not in any way serve as a "trap" for petitioner. Like *Zauderer*, the amendment simply recited another way in which petitioner's solicitation letter was misleading. Since the hearing revealed evidence of an additional falsehood in the letter, beyond the misrepresentation concerning the customary fees of other attorneys, the Committee properly allowed amendment of the charge.*

Since the amended charge related to the same letter which was the subject of the original charge, simply recited another reason why the letter was false and misleading, and was not based on evidence presented by petitioner in defense to the original charges, *Ruffalo* has no application here. Moreover, as in *Zauderer*, petitioner was given ample opportunity to present the Committee with rebuttal evidence to the amended charge, and had a full and fair opportunity to defend against the charge in the subsequent proceedings before the Supreme Court of New Jersey. Hence his claims of due process violation are insubstantial and do not merit review by this Court.

CONCLUSION

The petition in this case presents no issues requiring review by this Court. Petitioner was properly disciplined,

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* As this court recognized in *Shapero*, the Supreme Court of New Jersey and its Advertising Committee were well within their constitutional authority in "requir[ing] the lawyer to prove the truth of the fact stated" in his advertisement. 486 *U.S.* at 477.

through a public reprimand, for sending a false and misleading advertisement to the family of a recent disaster victim at a time when he knew or should have known that the family was unable to make a reasoned judgment concerning retention of counsel. The Supreme Court of New Jersey has placed reasonable, and very limited, restrictions on attorneys' ability to send targeted direct mail solicitations to the families of victims of disastrous accidents. Moreover, the rule is currently under reconsideration to determine if its limitations can be made still more precise. For all of these reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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